

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-6120

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

ALBERT M. BILLITERI,

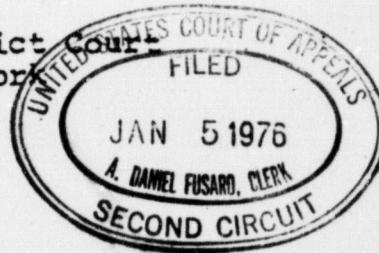
Plaintiff-Appellee,

v.

UNITED STATES BOARD OF PAROLE and MEMBERS
OF THE UNITED STATES BOARD OF PAROLE,
Individually and in Their Official Capacity, and
UNITED STATES OF AMERICA,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of New York



JOINT APPENDIX PART I

PHILIP B. ABRAMOWITZ
Martocche, Collesano,
Abramowitz & Geller
76 Niagara Street
Buffalo, New York 14202

Attorney for Appellee

RICHARD L. THORNBURGH
Assistant Attorney General

ROBERT L. KEUCH
PATRICK J. GLYNN
S. CASS WEILAND
Attorneys, Department of Justice
Washington, D.C. 20530

Attorneys for Appellants.

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JTC

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

Form No. 106 Rev.

Civ-74-365

TITLE OF CASE	ATTORNEYS				
For plaintiff:					
ALBERT M. BILLITERI v. UNITED STATES BOARD OF PAROLE and MEMBERS OF THE UNITED STATES BOARD OF PAROLE, Individually and in Their Official Capacity and UNITED STATES OF AMERICA	Philip B. Abramowitz, Esq. 736 Brisbane Building Buffalo, New York 14203 Martocche, Collesano, Abramowitz & Geller 76 Niagara Street Buffalo, New York 14202				
For defendant:					
John T. Elfvin, U.S. Atty.					
STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
5 mailed	Clerk	7/6/74	#15212	.50	
		7/30/74	Treas vs 905		15.00
6 mailed	Marshal				
asis of Action: onstitutional rights	Docket fee				
	Witness fees				
tion arose at:	Depositions				

DATE	PROCEEDINGS	Date Order Judgment
1974		
July 26	Filed complaint.	
26	JS 5 made	
30	Filed order to show cause why an order & Judgment should not be issued declaring the action taken by US Bd. of Parole arbitrary etc ret. 8-5-74-Curtin, DJ adj. 8-26-74 adj. 9-9-74. Submitted.	F-154
23	Filed Defts. answer to pltf. complaint & order to show cause.	
23	Filed Marshals ret. on Subpoena to Produce served on U.S. Bd. of Parole & Ed. Flannigan served on 8-20-74.	
26	" Pltfs. affidavit in response to the affidavits of Dennis P.O'Keefe and John Sicoli	
Aug. 29	Filed Pltfs. affidavit in further response to affidavits of John Sicoli	
Sept. 5	Filed Defts. supplemental answer to S&C. Order to show Cause etc.	
26	" Defts' second supplemental answer to S&C, order to show cause, etc.	
Nov. 26	" Decision & Order that Pltf. be released from federal custody, etc.-Curtin, J. (notice & copy to Messrs. Abramowitz, Elfrin & O'Keefe)	F-155
26	JS 6 made	
Dec. 20	Filed affidavit of Joseph Pokinski Adm. Examiner U.S. Bd. of Parole	
26	Filed order to show cause why Pltf. should not be discharged immediately from Federal Custody etc. ret. 1-3-75-Curtin, DJ	F-155
1975		
Jan. 6	Filed Govts. preliminary answer	
6	Filed order that the parties are directed to appear before the Ct. on 1-16-75 & that at that time defts. shall produce transcripts of the proceedings of the pltfs. parole application on 12-11-74-Curtin, DJ Notice & copies to Philip B. Abramowitz & U.S. Atty.	F-156
6	The Ct. approved the request of Govt. for more time & adj. proceedings to 1-16-75 at 2:00pm	
17	Motion for reduction of sentence. Pre-sentence report was marked as exhibit 1 in Cr-70-197 & ret. to Probation Officer. If necessary a Xerox copy will be made. Submitted.	
23	Filed affidavit of Philip Abramowitz to clarify & supplement the comments made before the Ct. 1-17-75 (in Civ-74-580)	
24	Filed affidavit of Philip Abramowitz. (in Civ-74-580)	
28	Filed defts., Board of Parole's answer to the pltfs. affidavit received 1-24-75. (in Civ-74-580)	
16	Filed Govts. response to the Cts. order of 11-26-74, to the pltfs. complaint & orders to show cause of 12-24-74 & the Cts. order of 1-6-75. (in Civ-74-580)	
Mar. 24	Filed pltfs notice of motion for an order admitting the pltf. to bail etc ret. 3-31-75 (Civ-75-580)	
31	Motion to admit pltf. to bail. Motion denied.	
Apr. 4	Filed order that a hearing be scheduled for 4-22-75 at 10:00am for the purpose of taking testimony of the issues of organized crime connections of pltf. etc.-Curtin, DJ Notice & copies to Philip Abramowitz & U.S. Atty. (Civ-74-317)	F-157
4	JS 5 made	
Apr. 28	Filed Govts. memorandum of law & fact which bear upon the hearing of 4-30-75	
30	Hearing on motion to grant parole. Briefs to be filed by counsel at a time to be determined by the Ct., which will be some time after the transcript of this proceeding is available to counsel.	

365
Billiteri v. U.S. Board of Parole et al.

Rev. Civil Docket Continuation

DATE 1975	PROCEEDINGS	Date of Judgment
May. 1	Filed subpoena to testify served on Gregory Parness on 4-25-75	
7	Filed Mar. ret. on Writ of Habeas Corpus Ad Testificandum served on 4-10-75 & 5-1-75	
8	Filed transcript of proceedings of 4-30-75.	
19	Filed the Boards memorandum of law and fact relating to Petr. Billiteri parole date.	
19	Ret. date for briefs. Submitted.	
22	Filed Pltfs. brief.	
June 9	Filed Defts. supplemental memorandum of law	
9	Filed Pltfs. brief in letter-form dated 6-6-75	
July 2	Filed letter to Judge Curtin dated 7-1-75 from Dennis O'Keefe re the Board's Memorandum of 5-19-75	
Sent. 17	Filed Govts. answer to rets. request to be admitted to bail pending the decision in this matter.	
17	" decision & order that the deft.. U.S. Bd. of Parole release the F-10 pltf. on parole attended by such conditions & privileges deemed appropriate by the C. in its discretion-Curtin.DJ Notice & copies to F-11, Abramowitz & U.S. Atty.	
17	JS 6 made	
Nov. 11	Filed Defts'. Notice of Appeal (copy mailed to Mr. Abramowitz and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to U.S. Atty.)	

C

3

CLOSED. April

CIVIL DOCKET
UNITED STATES DISTRICT COURT

JOHN T. CURT
JOHN T. CURT

Jury demand date:

Civ-74-580

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS				
ALBERT M. BILLITERI	For plaintiff:				
v.	Philip B. Abramowitz, Esq.				
UNITED STATES BOARD OF PAROLE	Martocche, Collesano, Abramowitz & Geller 74 Niagara Square Buffalo, New York 14202				
For defendant:					
STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
mailed	Clerk	12/24/70	417859	15 00	
		12/30/70	Trm UScl 70-31		15 00
6 mailed	Marshal				
Sis of Action: <u>petition</u> <u>release from prison</u>	Docket fee				
	Witness fees				
tion arose at:	Depositions				
		D			4

Civ-74-580 Albert M. Billiteri v. United States Board of Parole

DATE	PROCEEDINGS	Date Judgm
1974		
Dec. 24	Filed petition and complaint.	
24	Issued summons and 4 copies.	
24	JS 5 made	
26	Filed order to show cause why the relief designated in the complaint F-1 should not be granted etc. ret. 1-3-75-Curtin, DJ	
1975		
Jan. 3	Filed Mar. ret. on S&C served by Cert. mail on U.S. Atty. on 12-30-74; & U.S. Bd. of Parole on 12-30-74	
6	Filed Govts. preliminary answer. (in Civ-74-365)	
6	Filed order that the parties are directed to appear before the Ct. on F-1-16-75 & at that time defts. shall produce transcripts of the proceedings of the pltfs. parole application on 12-11-74 etc. - Curtin, DJ Notice & copies to Philip Abramowitz & U.S. Atty. (in Civ-74-365)	
3	the Ct. approved the request by Govt. for more time & adj. proceedings to 1-16-75 at 2:00pm Hearing adj. to 1-17-75	
17	Motion for reduction of sentence. Pre-sentence report was marked as exhibit 1 in Cr-70-197 & ret. to Probation Office. If necessary a Xerox copy will be made. Motion submitted.	
23	Filed affidavit of Philip Abramowitz to clarify & supplement the facts made before the Ct. on 1-17-75.	
24	Filed affidavit of Philip Abramowitz.	
28	Filed L. Board of Parole's answer to the pltfs. affidavit received 1-24-75	
16	Filed Govts. response to the Cts. order of 11-26-74, to the pltfs. complaint & orders to show cause of 12-24-74 & to the Cts. order of 1-6-75	
Mar. 24	Filed Pltfs. notice of motion for an order admitting pltf. to bail etc. ret. 3-31-75	
Apr. 4	Filed order that a hearing be scheduled for 4-22-75 at 10:00am for F-1 the purpose of taking testimony of the issued of organized crime connections of pltf. etc. -Curtin, DJ Notice & copies to Philip Abramowitz & U.S. Atty.	
28	Filed Govts. memorandum of law and fact which bear upon the hearing on 4-30-75 (in Civ-74-365)	
May 1	Filed subpoena to testify served on Gregory Parness on 4-25-75. (in Civ-74-365)	
7	Filed Mar. ret. on Writ of Habeas Corpus Ad Testificandum served on 4-10-75 & 5-1-75 (in Civ-74-365)	
8	Filed transcript of proceedings of 4-30-75 (in Civ-74-365)	
19	Filed The Board's memorandum of law and fact relating to Petr. Billiteri parole denied (in Civ-74-365)	
19	Ret. date for briefs. Submitted.	
22	Filed Pltfs. brief. (in Civ-74-365)	
June 9	Filed defts. supplemental memorandum of law. (in Civ-74-365)	
9	Filed Pltfs. brief in letter form to Judge Curtin dated 6-6-75 (in Civ-74-365)	
July 2	Filed letter to Judge Curtin dated 7-1-75 from Dennis O'Keefe re the Board's Memorandum of 5-19-75 (in Civ-74-365)	
Sept. 17	Filed Govts. answer to petr request to be admitted to bail pending the decision on this matter. (in Civ-74-365)	
17	Filed decision & order that the deft.. U.S. Bd. of Parole release the pltf. on parole, attended by such conditions & privileges deemed appropriate by the Bd. in its discretion-Curtin DJ Notice & Copies to Philip Abramowitz & U.S. Atty. (in Civ-74-365)	
17	JS 6 made	

(Cont'd. on next sheet)

110 Rev. Civil Docket Continuation

DATE 975	PROCEEDINGS	Date of Judgment
2/11	Filed Deft's. Notice of Appeal (copy mailed to Mr. Abramowitz and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to U.S. Atty.) (in Civ-74-365)	

F

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United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

S E L I C T
X served m
JUL 24 1974
UNITED STATES ATTORNEY

CIV - 74 - 365

CIVIL ACTION FILE NO. _____

ALBERT M. BILLITERI

Plaintiff

v.
United States Board of Parole andMEMBERS OF THE UNITED STATES BOARD
OF PAROLE, INDIVIDUALLY AND IN THEIR
OFFICIAL CAPACITY AND

THE UNITED STATES OF AMERICA

Defendant(s)

SUMMONS

To the above named Defendant(s):

You are hereby summoned and required to serve upon

Philip B. Abramowitz,

REPT

plaintiff's attorney, whose address 736 Brisbane Building, Buffalo, New York

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court

Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

COMPLAINT

vs.
United States Board of Parole and
MEMBERS OF THE UNITED
STATES BOARD OF PAROLE, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITY and

CIV - 74 - 365

THE UNITED STATES OF AMERICA

Defendants

Plaintiff, ALBERT M. BILLITERI, by his attorney,
PHILIP B. ABRAMOWITZ, complaining of the Defendants,
respectfully alleges:

1. That Plaintiff, ALBERT M. BILLITERI, is presently
incarcerated in the United States Penitentiary at Lewisburg,
Pennsylvania.

2. That immediately prior to his incarceration, the
Plaintiff was domiciled in Buffalo, New York.

3. That the UNITED STATES BOARD OF PAROLE and its
representatives have been vested with exclusive authority by
Congress to determine when an inmate should be placed on
parole.

4. That the UNITED STATES OF AMERICA is a sovereign
corporation.

5. That on or about July 5, 1972, Plaintiff was
sentenced by the HON. JOHN O. HENDERSON, Chief Judge of the
United States District Court for the Western District of
New York to a term of five years imprisonment.

6. That on or about March 11, 1974, the Plaintiff
became eligible for parole.

7. That in a decision dated March 11, 1974, the
UNITED STATES PAROLE BOARD denied Plaintiff parole giving as
its reason:

Your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society. (See Exhibit "A" attached hereto and made a part hereof.)

8. That no other explanation was given for the failure of the Plaintiff to be granted parole.
9. That all administrative appeals have been denied and final decision was rendered on or about July 15, 1974.
10. That the reasons for the Plaintiff being denied parole are capricious, arbitrary, totally without foundation, vague and unlawful.
11. That the PAROLE BOARD never gave the Plaintiff an opportunity for a hearing, which comports with due process standards.
12. That the Plaintiff's institutional record was not considered by the PAROLE BOARD.
13. That Plaintiff was denied parole because he is secretly classified by the Government as "O.C." or "S.O."
14. That the parole hearing and the decision not to grant parole violated Plaintiff's right to freedom of assembly under the First Amendment of the Constitution; and cruel and unusual punishment under the Eighth Amendment.
15. That the parole hearing and the decision not to grant parole violated the Plaintiff's right to due process and equal protection of the law in violation of the Fifth Amendment.
16. That the decision to deny parole was in violation of the PAROLE BOARD's guidelines.
17. That the parole hearing was in name only because the decision not to grant parole was made before the hearing even began.
18. That the parole hearing and the PAROLE BOARD's decision denied the Plaintiff his constitutional right to fundamental fairness.
19. That the PAROLE BOARD considered information

which the Plaintiff did not have an opportunity to see, let alone rebut.

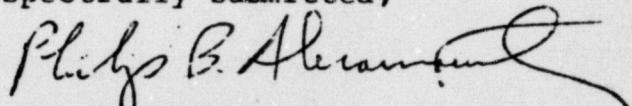
WHEREFORE, your Petitioner respectfully requests that this Court Order a new hearing for the Plaintiff wherein Plaintiff will be given a hearing fully comporting with due process standards, and

WHEREFORE, your Petitioner respectfully requests that this Court declare that the reason given by the BOARD for its denial of parole is arbitrary, capricious, unlawful and void as a matter of law, and

WHEREFORE your Petitioner respectfully requests that this Court Order that the Plaintiff be paroled.

DATED: Buffalo, New York
July 25, 1974

Respectfully submitted,


PHILIP B. ABRAMOWITZ
Attorney for Plaintiff
Address and P.O. Address
736 Brisbane Building
Buffalo, New York 14202

10

U. S. BOARD OF PAROLE

ORDER AND REASONS

NAME:

REG. NO.:

Albert M. Billiteri

87332-132

INST:

DATE:

MAR 11 1974

Lewisburg

ORDER:

Continue to Expiration

REASONS:

Our release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

vs.

MEMBERS OF THE UNITED STATES
BOARD OF PAROLE, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITY and
THE UNITED STATES OF AMERICA

ORDER TO
SHOW CAUSE

CIV - 74 - 365

Defendants

Upon the annexed Affidavit of PHILIP B. ABRAMOWITZ and upon all the pleadings and proceedings had herein let the Government show cause at a Special Term of this Court to be held on the 5 day of August, 1974, at _____ o'clock in the _____ noon of that day or as soon thereafter as counsel may be heard why an Order and Judgment would not be issued declaring the action taken by the UNITED STATES BOARD OF PAROLE arbitrary, capricious and unlawful; let the Government further show cause why a new hearing should not be Ordered and let the Government further show cause why this Court should not Order the Plaintiff's release on parole, and it is further

ORDERED, that service of this Order, together with the annexed Affidavit and Complaint made upon the United States Attorney's Office on the 29 day of July, 1974, by 5 o'clock in the afternoon of that date should be deemed good and sufficient service.

ENTER:

John T. Curtin
JOHN T. CURTIN, CHIEF JUDGE

Sworn to before me this,
day of 19.....

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

vs.

AFFIDAVIT

MEMBERS OF THE UNITED STATES
BOARD OF PAROLE, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITY and

THE UNITED STATES OF AMERICA

Defendants

STATE OF NEW YORK)
COUNTY OF ERIE)ss.:
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, being duly sworn, deposes and
says:

1. That I am an attorney at Law duly licensed to
practice before this Court.
2. That I have been retained by ALBERT M. BILLITERI

PHILIP B. ABRAMOWITZ, being duly sworn, deposes and says:

1. That I am an attorney at Law duly licensed to practice before this Court.
2. That I have been retained by ALBERT M. BILLITERI to represent him in this action.
3. That the reason why ALBERT M. BILLITERI was denied parole according to the PAROLE BOARD was:

Your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society.

4. That in the case of United States v. Ken Candarini, 369 F.S. 1132, Judge Travia of the Eastern District of New York ordered that:

Mere pro forma language to the effect that 'Your release at this time would depreciate the seriousness of the offense committed' will not suffice.

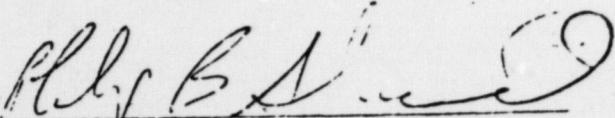
5. That I have spoken on this date with ETHAN LEVIN-EPSTEIN, the Assistant United States Attorney who handled

-1-

Sworn to before me this,
day of 19.....

13

this case for the Government who advised me that the Government was not going to appeal this decision and that the Government would comply with an Order of Judge Travia requiring all Federal Prisons in the North East Region, which includes Lewisburg Prison, to cease and desist from denying parole based on the reason given the Plaintiff in this case.


Philip B. Abramowitz

Sworn to before me this

25 day of July, 1974.

ANTORE R. MARTOCHE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1975

-2-

Sworn to before me this,
day of 19.....

14

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

-v-

Civil Action
File No. 74-365

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

UNITED STATES BOARD OF PAROLE'S
ANSWER TO PLAINTIFF BILLITERI'S
SUMMONS, COMPLAINT AND ORDER TO SHOW CAUSE

On 29 July 1974, there was served on the Government
of the United States a Civil Summons, a Civil Complaint, an
Order to Show Cause and a supporting Affidavit directed to the
United States Board of Parole, named therein as a defendant in
this matter.

All of these various documents deal with the same subject, the United States Board of Parole's denial of parole to plaintiff Albert M. Billiteri.

The gist of the plaintiff's argument, which is buttressed on the case of United States v. Ken Candarini, 369 F.S. 1132, is to the effect that the Parole Board failed to give plaintiff Billiteri a sufficient specific reason for its denial of his parole application, thereby denying to Billiteri the "bare rudiments of due process" required by Candarini.

On page 1137 of Candarini the Court said,

What is required is that the Board set forth sufficient facts and reasons to enable a reviewing court to ascertain whether an abuse of discretion has been committed and to enable the inmate to know why he has been denied parole...

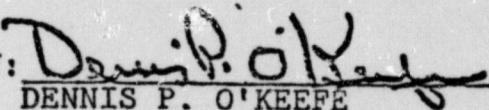
The Government, acting on behalf of the defendant United States Board of Parole, et al., agrees that the above requirement is the requirement to be applied in this case and submits that the Board of Parole's earlier Order and Reasons, given to plaintiff Billiteri on 11 March 1974, did not meet the requirements of rudimentary due process as set forth in Candarini.

Wherefore, the Government hereby submits the Affidavit of John F. Sicoli, Senior Analyst, United States Board of Parole, wherein on page 2, paragraph 4, Mr. Sicoli states with specificity the reasons for the Board's denial of plaintiff Billiteri's parole.

Since the Board has now complied with the requirements set forth in Candarini, the Government respectfully submits that all the petitioner's requests have been complied with and that any further requests, petitions or demands of the plaintiff Billiteri should be denied.

Respectfully submitted,

JOHN T. ELFVIN
United States Attorney
Western District of New York

BY: 
DENNIS P. O'KEEFE
Department of Justice Attorney

DATED: August 21, 1974

AT: Buffalo, New York

16

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

v.

Civil Action File
number 74365

UNITED STATES BOARD OF PAROLE, et al]

Defendants

AFFIDAVIT

I, John Sicoli, being duly sworn, depose and
state as follows:

I am the senior analyst assigned to the Northeast
Regional Office of the United States Board of Parole with
offices at Scott Plaza II, Philadelphia, Pennsylvania.

I have examined the file of Albert M. Billiteri,
Register Number 87332-132, and find as follows:

1. Mr. Billiteri was convicted of Conspiracy and
Extortionate Extensions of Credit on July 5, 1972 and
received a Regular Adult sentence. He was committed to the
United States Penitentiary at Leavenworth, Kansas on July 31,
1972. He was transferred to the United States Penitentiary
at Lewisburg, Pennsylvania on June 11, 1973.

2. Mr. Billiteri became eligible for parole on
March 3, 1974 under 18 USC 4202 and had his initial parole
hearing on February 14, 1974. On March 11, 1974 the Regional
Director issued an order continuing Mr. Billiteri to expiration.

RECEIVED
* AUG 20 1974 *

Mr. Billiteri appealed his decision administratively and on July 3, 1974 the National Appellate Board entered an order affirming the previous decisions.

3. The reason given to support the decision was: your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society.

4. Mr. Billiteri's offense behavior was rated as a very high severity and he received a salient factor score of 6. Guidelines established by the Board which consider these factors indicate a range of 36-45 months to be served before release for adult cases with good institutional program performance and adjustment. After consideration of all relevant factors and information presented it was found that a decision outside the guidelines was not warranted at this time. Therefore the Board ordered that Mr. Billiteri be continued to expiration. He has a mandatory release date of March 10, 1976 and a full term date of July 3, 1977 with one day of jail time.

John F. Sicoli

John F. Sicoli

Senior Analyst

United States Board of Parole

Philadelphia
Pennsylvania

Subscribed and sworn to before me this 16th day of August 1974.

Helen S. Melton

Notary Public
NOTARY PUBLIC
Timucum Township, Del. Co., Pa.
My Commission Expires Jan. 31, 1977

Date: July 25, 1974

[Seal of Court]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

AFFIDAVIT

-vs-

File No. 74-365

UNITED STATES BOARD OF PAROLE, ET AL

Defendants

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, being duly sworn deposes and
says:

1. That I have been retained by Albert M. Billiteri
to represent him in the above-referenced matter. This
Affidavit is submitted in response to the Affidavits of Dennis P.
O'Keefe and John Sicoli.

2. Mr. O'Keefe in his Affidavit of August 21, 1974,
admitted that the case of United States v. Candarini, 369 F. Supp.
1132, is binding on this Court.

3. As cited by Mr. O'Keefe, Candarini states:

"What is required is that the Board [of Parole]
set forth sufficient facts and reasons to
enable a reviewing court to ascertain whether
an abuse of discretion has been committed and
to enable the inmate to know why he has been
denied parole. . ." (Emphasis supplied at 1137)

4. Mr. O'Keefe's assertion that the requirements of
Candarini have been complied with because of the Affidavit of
John F. Sicoli, a senior analyst of the U. S. Board of Parole,
is incorrect.

5. In the first place, Mr. Sicoli appears not even to
know the crime for which Mr. Billiteri is in jail for. He
states "Mr. Billiteri was convicted of Conspiracy and Extortion-
ate Extensions of Credit".

6. In fact, Mr. Billiteri pled guilty to a simple

-2-

7. That in a decision dated March 11, 1974, the

UNITED STATES PAROLE BOARD denied Plaintiff parole giving as
its reason:

8

conspiracy count in violation of Title 18 U. S. Code §371.

7. Mr. Sicoli's Affidavit in no way complies with the requirements of Candarini, or there is nothing in that Affidavit from which the Court can determine that the Board did not abuse its discretion in giving Mr. Billiteri a "salient factor score of 6"--(whatever that means). Further, there is nothing in the Affidavit to permit this Court to verify Mr. Sicoli's conclusory statement "After consideration of all relevant factors and information presented it was found that a decision outside the guidelines was not warranted at this time".

8. Further, Mr. Billiteri has the right to have the United States Board of Parole and not some bureaucrat within the Board of Parole give reasons for denying parole.

9. In addition, neither Mr. Billiteri nor his attorney were ever permitted to see "all relevant factors and information" which the Board of Parole or John Sicoli used in making their decision, and neither Mr. Billiteri nor his attorney were ever permitted to see the information on which Mr. Sicoli relied to give a "salient factor score of 6".

10. The issue of whether or not Mr. Billiteri has the right to see and examine the evidence which was used against him goes directly to the heart of the fact-finding process.

WHEREFORE, it is respectfully requested that this Court grant the Plaintiff's motion and order this case remanded to the Board of Parole with instructions that Mr. Billiteri be given a parole hearing where minimal due process is observed--at the very least Mr. Billiteri should have the right to see and examine what evidence the Board of Parole used in denying him his parole, and present witnesses and evidence on his own behalf.

Philip B. Abramovitz

Sworn to before me this
____ day of August, 1974.

decision denied the Plaintiff his constitutional right to fundamental fairness.

19. That the PAROLE BOARD considered information

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

-vs-

UNITED STATES BOARD OF PAROLE ET AL

Defendants

AFFIDAVIT

File No. 74-365

STATE OF NEW YORK)
COUNTY OF ERIE } ss.:
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, being duly sworn, deposes and says:

1. That this Affidavit is submitted in further response to the Affidavits of John Sicoli, a senior analyst of the United States Board of Parole, and Dennis P. O'Keefe, attorney with the Department of Justice.

2. In paragraph "1" of his Affidavit, Mr. Sicoli makes an egregious error which vitiates his entire analysis of Albert M. Billiteri's file.

3. Mr. Sicoli states that "Mr. Billiteri was convicted of Conspiracy and Extortionate Extensions of Credit on July 5, 1972..." (Emphasis supplied).

4. As can be seen from Plaintiff's exhibit "A" (a portion of the transcript of the plea) and "B" (order for dismissal) attached hereto and made a part hereof, there was, according to Judge Henderson, "no question" that Mr. Billiteri and pled only to a violation of Title 18 United States Code §371/ that the other four counts of the indictment were dismissed.

5. In determining whether or not a person should get parole, the Parole Board uses a grid as published in 38 Federal Register 31942 (1973).

6. A person with a "salient factor score of 6", which Mr. Sicoli says is Albert Billiteri's salient factor score, who

was in prison for Extortionate Extensions of Credit in violation of Title 18 United States Code §892, which Mr. Sicoli says Albert M. Billiteri is in prison for, would be rated as "a very high severity" and would be required to serve "36- 5 months... before release" as Mr. Sicoli has stated. (See Mr. Sicoli's Affidavit, paragraph "4")

7. However, Albert Billiteri has not been convicted nor has he pled guilty to Extortionate Extensions of Credit as Mr. Sicoli believes and, therefore, the Board has violated its own rules and acted totally outside of its own guidelines in giving Mr. Billiteri a "very high" severity rating, requiring a 36-45 month sentence.

8. All of the other classifications under "very high" severity ratings carry penalties of between 15 and 25 years. They include armed robbery, drugs--heavy narcotics, and extortion.

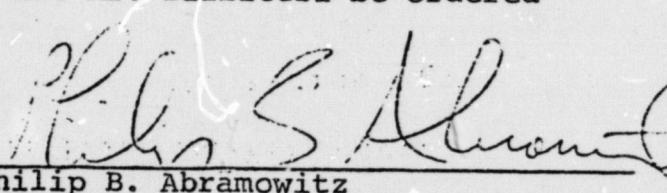
9. Mr. Billiteri's crime, falling within the 5 year range, appears to be within the "moderate" category as defined by the Board of Parole, which include crimes which carry penalties in the range of between 2 and 10 years. These crimes include bribery of public officials, mailing threatening communications, possessing and transporting stolen property, and the possession, purchase or sale of altered weapons or machine guns. A person with a salient factor score of 6 who falls into this category is eligible for parole under the guidelines between 16 and 20 months. As of the first week of September of this year, Mr. Billiteri will have served 26 months.

10. Even if Mr. Billiteri's conspiracy count, which carries a maximum penalty of only five years is lumped in with the "high" offense category, which includes crimes carrying penalties of between 10 and 20 years such as bank burglary, robbery, and manufacturing counterfeit currency, Mr. Billiteri would still, under the Board's guidelines, be required to serve 22 only between 20 and 26 months, and thus be released on parole at

the present time.

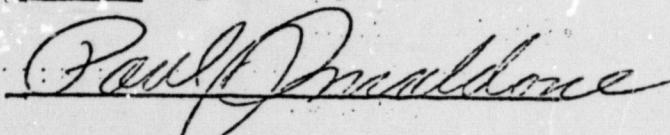
11. It would be difficult for Mr. Sicoli to claim that a decision outside the guidelines is appropriate in this case because in paragraph "4" of his Affidavit he states "It was found that a decision outside the guidelines was not warranted".

WHEREFORE, it is respectfully requested that this Court find that in this case the Board of Parole did not comply with its own rules and regulations and that Mr. Billiteri be ordered released on parole forthwith.


Philip B. Abramowitz

Sworn to before this

27 day of August, 1974.


Paul J. Smaldone

PAUL J. SMALDONE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1973

1 time. Do you think we have fully
2 complied with Criminal Rule 11?

3 MR. O'KEEFE: Yes, your Honor.

4 THE COURT: You have no suggestions for further
5 inquiry of these defendants within the
6 purview of that rule?

7 MR. O'KEEFE: No, your Honor.

8 THE COURT: All right. Now, Mr. Billiteri, what
9 is your plea to Count I of this indict-
10 ment, Criminal 1970-197?

11 MR. BOREANAZ: Your Honor, alleging a violation of
12 Title 18, Section 371. The reason I
13 add that, your Honor, is that there is
14 some question here as to what this
15 count alleges, and I want to be certain
16 that my client is pleading to a violation
17 of Section 371.

18 THE COURT: There is no question, you are pleading
19 to Title 18, United States Code, Section
20 371, that is, the conspiracy to violate
21 certain other laws with respect to loan
22 sharking.

23 MR. BOREANAZ: That violation my client will plead
24 guilty to, your Honor.

25 THE COURT: I want to hear you, Mr. Billiteri. Is
26 that your plea?

27 MR. BILLITERI: Yes, sir.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

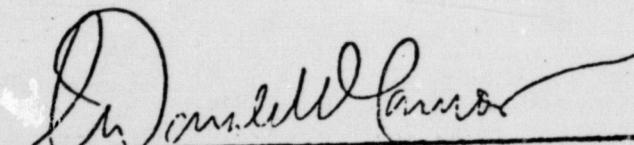
-vs-

ALBERT M. BILLITERI

Criminal No. 1970-197

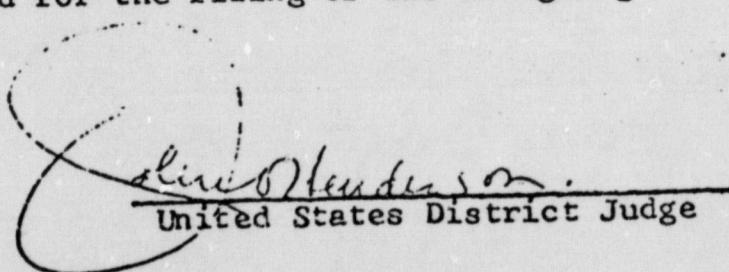
ORDER FOR DISMISSAL

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure and by leave of Court endorsed hereon, the Acting United States Attorney for the Western District of New York hereby dismisses Counts 2, 3, 4 and 5 of the indictment against ALBERT M. BILLITERI, defendant.



Acting United States Attorney

Leave of Court is granted for the filing of the foregoing dismissal.



United States District Judge

Date:

July 5, 1972.

25

Sir : Take notice of an.....
of which the within is a copy, duly
granted in the within entitled action,
on the..... day of
..... 19....., and duly
entered in the office of the Clerk of the
County of..... on the
..... day of..... 19.....
Dated....., N. Y.
..... 19

MARTOCHE & COLLESANO

Attorneys for
Office and Post Office Address
74 Niagara Square
Buffalo, New York 14202
Phone: 855-0717

To
Attorney for.....

State of New York

.....UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
County of

ALBERT M. BILLITERI

Plaintiff

-vs-

UNITED STATES BOARD OF
PAROLE ET AL

Defendants

Original

Affidavit

MARTOCHE & COLLESANO

Attorneys for Plaintiff
Office and Post Office Address
74 Niagara Square
Buffalo, New York 14202
Phone: 855-0717

Service of a copy of the within is
hereby admitted this day of
, 19

Attorney for

(AFFIDAVIT OF SERVICE BY MAIL)

STATE OF NEW YORK
COUNTY OF } ss:
..... OF

..... being duly sworn, deposes and says that he is
..... the attorney for the above named..... herein.
That on the..... day of..... 19..... he served the within
..... upon the attorney for the above named
..... by depositing a true copy of the same securely
..... enclosed in a postpaid wrapper in the Post-Office—a Post-Office Box regu-
..... larly maintained by the United States Government at

..... directed to said attorney for the
..... in said County of..... at

..... N. Y., at being the address within the State designated by h for that purpose upon the
..... prece^tting papers in this action, or the place where he then kept an office between which places
..... there was and now is a regular communication by mail.

..... Deponent is over the age of..... years.

Sworn to before me this,

day of....., 19.....

(CERTIFICATION OF ATTORNEY)

STATE OF NEW YORK
COUNTY OF } ss:
..... OF

The undersigned attorney certifies that the within
..... has been compared by the undersigned with the original and found to be a true and cor-

26

FILED
Aug 29 8 25 AM '71
U.S. DISTRICT COURT
W.D. OF N.Y.

Dated:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

- v -

Civil Action
File No. 74-365

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

UNITED STATES BOARD OF PAROLE'S SUPPLEMENTAL
ANSWER TO PLAINTIFF BILLITERI'S SUMMONS,
COMPLAINT AND ORDER TO SHOW CAUSE OF
25 JULY 1974, TO HIS SUPPLEMENTAL AFFIDAVIT
RECEIVED BY THE GOVERNMENT ON 26 AUGUST 1974
AND TO THE PLAINTIFF'S SUPPLEMENTAL AFFIDAVIT
OF 27 AUGUST 1974 RECEIVED BY THE GOVERNMENT
ON 3 SEPTEMBER 1974

On 29 July 1974, there was served on the Government of the United States a Civil Summons, a Civil Complaint, an Order to Show Cause and a supporting affidavit annexed thereto, all naming the United States Board of Parole, et al. as defendants in this case. The Government submitted an Answer on 21 August 1974.

On Monday morning, 26 August 1974, the morning that a hearing was scheduled with regard to this matter, the Government received the first supplemental affidavit of the Plaintiff and the Court directed the Government to file a written answer by 9 September 1974. On 3 September 1974, the Government received the Plaintiff's second supplemental answer dated 27 August 1974.

Directing its attention to the original Civil Summons and Complaint, the Government answers as follows:

Allegations one (1) through seven (7) are admitted;

Allegations eight (8) through nineteen (19) are denied.

The Government now turns to the legal arguments posed in the three affidavits which now support the Show Cause Order of Plaintiff, Billiteri.

The first two affidavits deal with the same subject, the allegation that the reason given by the Parole Board for the denial of parole to Plaintiff, Billiteri, was insufficient and therefore a denial of "rudimentary due process" required by United States v. Jos. Candarini, 369 F.S. 1132. In its answer of 21 August 1974, the Government admitted that Candarini was controlling, admitted that the Board of Parole's Order and Reasons of 11 March 1974 was insufficient, and, in an attempt to comply with Candarini, provided to the Court and to Plaintiff Billiteri, the 16 August 1974 affidavit of one John F. Sicoli, Senior Analyst, United States Board of Parole.

Plaintiff's first supplemental affidavit alleged that the Sicoli affidavit was insufficient and therefore denied to Plaintiff, Billiteri, the "rudimentary due process" required by Candarini, the case upon which the Plaintiff relies.

The affidavit of John F. Sicoli, read in the light of and in conjunction with the Board of Parole's Parole Regulations of June 5, 1974 (see copy of Parole Regulations, attached) is almost exactly the same as the Board's finding in the Candarini case which Judge Travia found to be sufficient and therefore meeting the "rudimentary due process" requirements of his order in the case (See copy of Judge Travia's Order of 4 April 1974 and the Board's Order and Reasons re Jos. Candarini of 22 March 1974, attached).

Wherefore, since the Government and the Plaintiff both agree that Candarini is controlling and since the Government has submitted virtually the same information found sufficient by the Candarini Court itself, the Plaintiff's argument of insufficiency must fail.

The Plaintiff's second supplemental affidavit poses a new argument; namely, that the Parole Board's findings were based upon an erroneous premise.

The Plaintiff states that he was never convicted of Conspiracy and Extortionate

Extension of Credit, as set forth in Sicoli's affidavit, but of Conspiracy only, and in support of this contention submits a portion of a transcript of the plea of Plaintiff, Billiteri.

The Plaintiff's contention is true as far as it goes; however, as the Court is well aware, a defendant cannot be convicted of Conspiracy only, but must be convicted of a Conspiracy to violate some other law of the United States, in this case 18 U.S.C. 891 et seq., Extortionate Credit Transactions.

Relying upon his own false premise then, the Plaintiff goes on to compare his conviction to bribing public officials, mailing threatening communications, etc., a moderate category crime (see Parole Regulations attached, page 20031, "Moderate"). He then finds that since his crime falls in a moderate category, he should now be eligible for parole. The Board, on the contrary, found the Plaintiff's offense within the very high category, Extortion (see Parole Regulations, page 20031, "very high").

Turning to the Hobbs Act, 18 U.S.C. 1951, the classic extortion statute, we find the term extortion defined as follows:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear"

18 U.S.C. 891, the section the Plaintiff was convicted of conspiring to violate, defines an extortionate means as follows:

"An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation or property of any person."

The Court's attention is also directed to the first two footnotes at the bottom of page 20031 of the regulations which state:

1. If an offense is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offenses listed.
2. If any offense behavior can be classified under more than one category, the most serious applicable category is to be used.

Comparing the definitions and considering the footnotes instructions, it becomes apparent that the Board properly determined Plaintiff, Billiteri's, category as very high, extortion.

Since the Board has now complied with the "sufficiency" and "rudimentary due process" requirements of Candarini, and since the Board has correctly categorized Plaintiff, Billiteri's, conviction as very high, extortion, the Government submits that it has complied with all of the petitioner's valid requests, and that any further requests, petitions, or demands of the Plaintiff should be denied.

Respectfully submitted,

JOHN T. ELFVIN
United States Attorney

By:


DENNIS P. O'KEEFE
Department of Justice Attorney

DATED: 5 September, 1974

AT: Buffalo, New York

RECEIVED

JUN 28 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

U. S. BOARD OF PAROLE
X ILLGAL

IN THE MATTER OF THE APPLICATION
OF JOSEPH CANDARINI, BALTAZAR
SIERRA CORREA, ESTEBAN J. MONTOYA,
ROBERT TORRES, ALBERTO SALIZAR
PALACIO, NICHOLAS THOMAS BELVEDERE,
RONALD COSTA and BERNARD WILLIAMS,

ORDER

73 C 1471
73 C 1472
73 C 1473
73 C 1493
73 C 1573
73 C 1582
73 C 1618
73 C 1632

Petitioners,

-against-

THE UNITED STATES BOARD OF PAROLE,

Respondents.

X

A Decision and Order of this Court, dated January 25, 1974 having been filed and requiring that the defendant Board of Parole submit to this Court, within 60 days of that date, proposed regulations implementing the appellate procedures then being used in the so-called "pilot project" operating within the Northeast Region on a permanent basis and further that the defendant Board of Parole provide written factual statements and reasons to inmates whose applications for parole have been denied, sufficient to apprise those inmates why they have been denied parole and how they are to better regulate their future conduct, commencing no later than 60 days from the date of that Decision and Order, and, application having been made by EDWARD JOHN BOYD V, United States Attorney for the Eastern District of New York, by Assistant United States Attorney ETHAN LEVIN-EPSTEIN, in these matters on March 27, 1974; and it appearing to the satisfaction of the Court:

1. That the defendant Board of Parole has made a good faith effort to comply with the Order of the Court

within the sixty days, and;

2. The Court being satisfied that the defendant Board of Parole will continue, with all deliberate speed, to further implement the mandate of the Decision and Order in the remaining regions of the Board of Parole,

NOW THEREFORE, IT IS ORDERED that that portion of the Decision and Order of this Court dated January 25, 1974, relating to inmates incarcerated in institutions comprising the Northeast Region of the United States Board of Parole be stayed until April 1, 1974 and further that that portion of the aforementioned Decision and Order relating to inmates outside of the Northeast Region be stayed until December 31, 1974 with leave granted to reapply for further extension should that become necessary due to circumstances beyond the control of the Board of Parole.

Dated: Brooklyn, New York
April 4, 1974

SO ORDERED:

15/

ANTHONY J. TRAVIA
United States District Judge

U. S. BOARD OF PAROLE

ORDER AND REASONS AS OF JULY 25, 1973

NAME: JOSEPH CANDARINI

REG. NO.: 76120-158

INST: DANBURY

DATE: March 22, 1974

ORDER: CONTINUE TO EXPIRATION

REASONS: Your offense behavior has been rated as Moderate severity. You have a salient factor score of 7. Guidelines established by the Board which consider the above factors indicate a range of 16-20 months to be served before release for Adult cases with good institutional adjustment and program performance. You have been in custody a total of 7 months. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration does not appear warranted.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI	Civil Action File
Plaintiff	number 74365
v.	
UNITED STATES BOARD OF PAROLE, <u>et al</u>	AFFIDAVIT
Defendants	

I, John Sicoli, being duly sworn, depose and
state as follows:

I am the senior analyst assigned to the Northeast
Regional Office of the United States Board of Parole with
offices at Scott Plaza II, Philadelphia, Pennsylvania.

I have examined the file of Albert M. Billiteri,
Register Number 87332-132, and find as follows:

1. Mr. Billiteri was convicted of Conspiracy and
Extortionate Extensions of Credit on July 5, 1972 and
received a Regular Adult sentence. He was committed to the
United States Penitentiary at Leavenworth, Kansas on July 31,
1972. He was transferred to the United States Penitentiary
at Lewisburg, Pennsylvania on June 11, 1973.

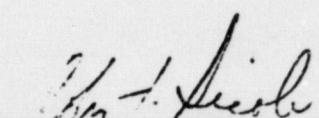
2. Mr. Billiteri became eligible for parole on
March 3, 1974 under 18 USC 4202 and had his initial parole
hearing on February 14, 1974. On March 11, 1974 the Regional
Directors issued an order continuing Mr. Billiteri to expiration.



Mr. Billili appealed his decision administratively and on July 3, 1974 the National Appellate Board entered an order affirming the previous decisions.

3. The reason given to support the decision was: your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society.

4. Mr. Billiteri's offense behavior was rated as a very high severity and he received a salient factor score of 6. Guidelines established by the Board which consider these factors indicate a range of 36-45 months to be served before release for adult cases with good institutional program performance and adjustment. After consideration of all relevant factors and information presented it was found that a decision outside the guidelines was not warranted at this time. Therefore the Board ordered that Mr. Billiteri be continued to expiration. He has a mandatory release date of March 10, 1976 and a full term date of July 3, 1977 with one day of jail time.

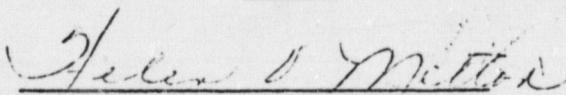

John F. Sicoli

Senior Analyst

United States Board of Parole

Philadelphia
Pennsylvania

Subscribed and sworn to before me this 6th day of August 1974.


Helen O. Miller

Notary Public

NOTARY PUBLIC
Tinicum Township, Del. Co., Pa.
My Commission Expires Jan 31, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

-v-

CIVIL ACTION

UNITED STATES BOARD OF PAROLE, et al.,

File No. 74-365

Defendants

UNITED STATES BOARD OF PAROLE'S SECOND SUPPLEMENTAL
ANSWER TO PLAINTIFF BILLITERI SUMMONS, COMPLAINT AND
ORDER TO SHOW CAUSE OF 25 JULY 1974, TO HIS SUPPLEMENTAL
AFFIDAVIT RECEIVED BY THE GOVERNMENT ON 26 AUGUST 1974,
TO THE PLAINTIFF'S SECOND SUPPLEMENTAL AFFIDAVIT OF
27 AUGUST 1974, TO THE PLAINTIFF MEMORANDUM OF LAW OF
12 SEPTEMBER 1974 AND TO THE PLAINTIFF'S LETTER OF
17 SEPTEMBER 1974

The following summarizes the events in this matter:

1. On July 5, 1972 the plaintiff, ALBERT M. BILLITERI, was convicted of conspiring to violate the Extortionate Credit Act, 18 U.S.C. 891 etc. He was sentenced to five years in the custody of the Attorney General and was fined \$10,000 (which is the subject of another civil suit presently before this Court).

2. BILLITERI was committed to the United States Penitentiary at Leavenworth, Kansas, on July 31, 1972, and later, at his request, was transferred to the United States Penitentiary at Lewisburg, Pennsylvania on June 11, 1973. One of the reasons for granting this request was so that BILLITERI might be closer to his family.

3. BILLITERI became eligible for parole on March 3, 1974 and had his initial parole hearing prior to that time, on February 14, 1974. On March 11, 1974 the Regional Directors of the Board of Parole issued an order continuing Mr. BILLITERI'S custody.

4. BILLITERI appealed the decision administratively and on July 3, 1974 the National Appellate Board of the United States Board of Parole entered an order affirming the earlier decision.

5. On July 29, 1974, there was served on the Government of the United States a Civil Summons, a Civil Complaint, an Order to Show Cause with a supporting affidavit annexed thereto, all naming the United States Board of Parole, et al. as defendants. The gist of the plaintiff's original argument was to the effect that the Board had failed to give him a specific reason for its denial of his parole.

6. On August 21, 1974, the Government answered the plaintiff, and through an August 16, 1974 affidavit of one John Sicoli, Senior Analyst for the United States Board of Parole, attempted to comply with the specificity and "rudimentary due process" requirements of Candarini, the case upon which the plaintiff relied.

7. On Monday, August 26, 1974, the plaintiff served upon the Government a supplemental affidavit which charged that the Government had not, through the affidavit of John Sicoli, complied with Candarini. The Government maintains that it has and relies on its answer of August 21, 1974.

8. On September 3, 1974, the Government received a second supplemental affidavit which did not direct itself to the question of the sufficiency of the Board's answer, but now challenged the answer as having erroneously cited the original violation of which the plaintiff stands convicted.

9. On September 5, 1974, the Government answered and specifically refuted both arguments: (1) The argument as to sufficiency of the answer, and (2) the answer as to the error in the affidavit.

10. On September 13, 1974, the Government received a Memorandum of Law from the plaintiff which takes an entirely new course. This memorandum implies that because of the lag in the administrative channels of the Board of Parole, the plaintiff should be released to his State detainer immediately. This argument is without foundation. The entire time taken to exhaust his administrative remedies ran from February 14, 1974 to July 3, 1974, which is more than reasonable. Moreover, since July 25, 1974, the plaintiff has had a number of opportunities to

have his day in Court and has been allowed to wander far afield from the argument originally posed in his Order to Show Cause.

11. On September 17, 1974, the Government received, via cover letter, a copy of a decision from the U.S. District Court for the Middle District of Pennsylvania titled Craft v. Attorney General of the United States, et al., Civil No. 74-439. The holding in this case was to the effect that Craft be granted a new hearing by the Board of Parole within thirty days or, if such hearing were not granted, the plaintiff was to be discharged.

The Government does not argue with the decision in the Craft case which involved a very young man, a first offender and one who apparently made a real rehabilitative effort involving taking college courses, etc. However, it would seem to be at odds with the defense's legal memorandum referred to in paragraph ten above which, on the contrary, scorns a new hearing and demands immediate parole to the plaintiff's State detainer.

I spoke to Assistant U.S. Attorney Michael McDowell, who is assigned to Lewisburg, Pennsylvania, a division of the Middle District of Pennsylvania, in regard to the Craft case. He advised me that most of the decisions coming out of the Middle District of Pennsylvania, including a recent decision by the Chief Judge of that District, hold contrary to the Craft case. Mr. McDowell is forwarding to me some of these decisions which I will make available to the Court and to the defense.

With all of the above in mind, the Government submits that plaintiff's request for relief has been granted and that any further requests, petitions or demands should be denied.

Respectfully submitted,

JOHN T. ELFVIN
United States Attorney

BY:

DENNIS P. O'KEEFE
Department of Justice Attorney

38

DATED: September, 26th, 1974 AT: Buffalo, New York

AT: Buffalo, New York.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

v.

UNITED STATES BOARD OF PAROLE,
et al.

Civ- 74-335

SIR: Take notice of an ORDER, of which the within is a copy,
duly granted in the within entitled action on the 26th day of
November, 1974, and entered in the Office of the
Clerk of the United States District Court, Western District of
New York, on the 25th day of November, 1974.

Dated: Buffalo, New York

November 26, 1974

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: Philip B. Abramowitz, Esq.
Attorney for Plaintiff

TO: Hon. John T. Elvius
Dennis O'Keefe, Esq.
Attorney for Defendant

Copy sent to Berry, C. G.
People's Council of San Joaquin
U. S. Post Office, San Joaquin
330 First St. N. W.
11-31-71
to Bill Gould, D.D.
13-4-71
also to Roberta Johnson

39

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

v.

Civ-74-365

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

DECISION

and

ORDER

CURTIN, DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

v.

Civ-74-365

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

APPEARANCES: PHILIP B. ABRAMOWITZ, ESQ.
Buffalo, New York, for the Plaintiff

JOHN T. ELFFVIN, ESQ., United States
Attorney (DENNIS O'KEEFE, ESQ.,
Department of Justice Attorney,
of counsel), Buffalo, New York,
for the Government

On July 5, 1972, plaintiff pled guilty to one count of conspiracy, a violation of 18 U.S.C. §371. He was subsequently sentenced by the late Chief Judge John O. Henderson to a term of five years and a fine of \$10,000. The remaining counts of the indictment regarding conspiracy and violations of the Extortionate Credit Act, 18 U.S.C. §801 et seq., were dismissed. Plaintiff was subsequently incarcerated and is presently serving his term in the Federal Correctional Institution at Lewisburg, Pa. (See Cr-1970-197 - W.D.N.Y.)

Plaintiff became eligible for parole on March 3, 1974. To evaluate his parole prognosis, an initial parole hearing was held on February 14, 1974. On March 11, 1974, the United States Board of Parole (hereinafter Board) issued an order which provided that the plaintiff "continue to expiration." The reason cited for the decision was:

Your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society.

The last available administrative review by the National Appellate Board of the United States Board of Parole, on July 3, 1974, resulted in an affirmation of the prior decision.

On July 29, 1974, this action was commenced. The complaint alleges that the reason given for denying parole was arbitrary, capricious, without foundation, vague and unlawful. The complaint further alleges that the procedures employed by the Board in reaching the decision violate plaintiff's rights to due process, equal protection, freedom of assembly, freedom from cruel and unusual punishment, and to fundamental fairness.

The relief sought included a prayer for a declaratory judgment that the reason given by the parole board was unlawful and the granting of parole, or the ordering of a new hearing to be conducted in accordance with due process.

The Government's responses allege that a sufficient basis for the Board's determination can be found in the prior decision read in conjunction with an affidavit of a senior analyst employed by the Board which explains in greater detail the reasons for denial of parole to the plaintiff. The Government claims that a similar process was deemed sufficient on remand in Candarini v. Attorney General of the United States, 369 F.Supp. 1132 (E.D.N.Y. 1974), the case upon which plaintiff based his claim.

The court has received numerous subsequent submissions from the plaintiff and the Government. In addition, the court heard oral argument on September 9, 1974, wherein the parties agreed that the taking of testimony was not necessary. A decision is, therefore, appropriate.

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- 2 -

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The initial inquiry for the court must relate to jurisdiction, although the parties have devoted scant attention to this question. The Administrative Procedure Act, 5 U.S.C. § 706(2) permits judicial examination of the action of the Board to determine whether or not there has been an abuse of discretion. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Pickus v. United States Board of Parole, ____ F.2d ____ (D.C. Cir. slip opinion 10/11/74); King v. U.S., 492 F.2d 1337 (7th Cir. 1974); Murley v. Peed, 203 F.2d 844 (D.C. Cir. 1961); Sobell v. Peed, 327 F.Supp. 1294 (S.D.N.Y. 1971); Candarini v. Attorney General of the United States, supra.

Plaintiff prays for declaratory relief as well as alternative forms of mandatory injunctive relief in the district wherein he resided prior to his incarceration. The Administrative Procedure Act provides that the proper form and venue for a judicial review proceeding is,

"... any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction."

5 U.S.C. § 703. Furthermore, the "competent jurisdiction" language can reasonably be interpreted as equivalent to general venue requirements. (Pickus v. United States Board of Parole, supra, at page 5, footnote 5.)

Under 28 U.S.C. § 1331(e), suits against executive agencies, like the Board, may be brought outside the District of Columbia, in the district in which the plaintiff resides. Liberation News Service v. Eastland, 426 F.2d 1379 (2d Cir. 1970). For a prisoner, the district of residence may be the one in which he resided prior to his incarceration. Ellingsberg v. Connell, 457 F.2d 210 (5th Cir. 1972); Candarini v. Attorney General of the United States, supra; Ott v. United States Board of Parole, 324 F. Supp. 1034 (W.D. Mo. 1971). See also Neuberger v. United States, 13 F.2d 541 (2d Cir. 1928).

The court concludes that a sufficient basis for jurisdiction exists; therefore, going forward to examine the merits is permissible.

From the record before the court, it is clear that the decision rendered by the Board is grounded upon an erroneous factual base. The affidavit of the Board's senior analyst submitted by the Government as support for the prior determinations missates the offense for which the plaintiff was sentenced. The affidavit states:

"Mr. Billiteri was convicted of conspiracy and extortionate extensions of credit" (Emphasis added.)

The plaintiff, however, was sentenced only for conspiracy and the other counts of the indictment were dismissed. Viewing this error in the perspective of the stated reason for denial of parole--namely "your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society" (emphasis added)--the court is forced to conclude that there was an abuse of discretion under 18 U.S.C. § 4203 and that the Board's decision violates the plaintiff's right to due process.

In the recent case of United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974)¹ our own Court of Appeals ruled that due process in state parole release

determinations requires, at the very least, a statement of reasons for denial which

. . . will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations. 500 F.2d 925, 929.

In Johnson, supra, there was no regulatory scheme defining the vast discretionary power vested in the State Parole Board. Furthermore, the State Board furnished no reasons at all when parole was denied. Both of these factors distinguish Johnson, supra, from the facts of the instant action.

In June of 1974 new regulations were promulgated by the Board to govern the federal parole release decision making process, 28 C.F.R. 2.1 et seq. This ambitious and praiseworthy effort by the Board attempts to inject an aura of consistency into parole determinations. The system enables a prospective parolee to evaluate his own family and criminal history, the severity of his current offense, release plans, education, etc., and determine a range of months within which he may be released. But

the guidelines are only guidelines and decisions outside them are authorized. 28 C.F.R. § 2.20 (c) and (d).

The plaintiff's situation points out the deficiencies of the current system, however, and demand further consideration by the Board. As stated above, it seems that the incorrect offense was fitted into the guidelines. Furthermore, the crime of conspiracy, 18 U.S.C. § 371, for which the plaintiff was actually convicted, is not listed in the guidelines.

The guidelines do provide for placement of omitted offenses (see notes 1, 2 and 3 under the Adult Guidelines Chart, 28 C.F.R. § 2.20), by measuring the so-called "offense behavior." In the plaintiff's case the offense behavior was assigned a "very high" severity classification because of the mistaken belief that he had been convicted of extortion. Counsel for the Government maintained, however, that even without the error the classification would not change because the plaintiff's offense behavior was extortionate.

The "very high" category includes extortion, but, in addition, it lists offenses such as armed robbery and forcible violations of the Mann Act, all crimes which

unlawful maximum sentences of twenty or twenty-five years. Conspiracy, in comparison, carries a five year maximum term, expressing the judgment of the Congress to limit the period of incarceration.

On this record, however, the court must decline to categorize the plaintiff's offense behavior. The complexity of the types of decisions the Board must make, especially with the regulations so new, is easily recognized. This court has no desire to act as a super parole board. The appropriate course is to remand the matter to allow the Board to consider all of the factors bearing upon the function it has been charged with by the Congress.

Federal Communications Comm'n v. Pottsville Broadcasting Co., 369 U.S. 134 (1940); Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952); McBride v. Smith, 495 F.2d 1057 (2d Cir. 1968).

It appears that certain factors ought to enter into the Board's determination, however. The first and foremost is closer adherence to the regulations. The "boiler plate" reason for denial of parole, namely, "your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the

welfare of society" requires explanation under the regulations. 28 C.F.R. § 3.13(c).

In this regard, in United States ex rel. Johnson v. Chairman, New York State Board of Parole, suors, the court of appeals labeled as a questionable policy

... denying parole where, because of the type of offense for which he had been committed, the prisoner has not yet served an "appropriate period" of incarceration that satisfies unarticulated and possibly inconsistent views of board members regarding community retribution, incapacitation, or general deterrence, despite the prisoner's readiness for the community and lack of need for further institutional control. 500 F.2d 925, 931.

Furthermore, the Johnson court indicated that a statement of the "essential facts upon which the Board's inferences are based" is necessary and desirable. 500 F.2d 925, 934.

An additional consideration is the use of alleged offenses in making the decision to parole. It has been intimated that the regulations may allow such use in determining the offense behavior question. Rupo v. Norton, 371 F. Supp. 153 (D.Conn. 1974). We express no

views at this time on that issue in light of the clear error below.

Because the plaintiff has served the minimum one-third of his maximum term and may qualify for release under the Board's guidelines, this court mandates that the defendant discharge the plaintiff from federal custody, unless within thirty days the United States Board of Parole reconsiders his application for release in a manner consistent with this opinion.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: November 26, 1974

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NOTWITHSTANDING

1. On November 10, 1974, the U.S. Supreme Court granted certiorari and vacated the judgment with instructions to the district court to dismiss the cause as moot.

AFFIDAVIT

I, Joseph Pokinski, being duly sworn, depose and state:

1. I am the Administrative Examiner of the Northeast Region of the U. S. Board of Parole with offices at Scott Plaza No. 2, Industrial Highway, Philadelphia, Pennsylvania.

2. I have been apprised of the order of the Honorable John T. Curtin, U. S. District Judge for the Western District of New York on November 26, 1974, regarding the case of Albert M. Billiteri, Register No. 87332-132 vs. U. S. Board of Parole.

In compliance with that order the Northeast Regional Director, Curtis C. Crawford, ordered an Examiner Team to conduct a parole hearing for Mr. Billiteri on December 11, 1974, at the United States Penitentiary at Lewisburg, Pennsylvania.

3. Mr. Billiteri's case has previously been designated by the Board as an original jurisdiction case pursuant to 28 C.F.R. S.17. In accordance with that regulation the five Regional Directors of the Board are required to make the determination regarding parole by reviewing the summary of the December 11 hearing. Because of the distances involved the Regional Directors review all original jurisdiction cases at their quarterly meetings. The next meeting will take place on January 13, 1975 at their North Central Region, Kansas City, Missouri. At that time the Board will decide the appropriate action to be taken as a result of the December 11 hearing.

DATE: 12/19/74

Subscribed and sworn to before me this 9 day of December, 1974. *Eva M. Faso*

Joseph N. Pokinski
JOSEPH N. POKINSKI
Administrative Examiner
U. S. Board of Parole, Northeast Region
Philadelphia, Pennsylvania 19113

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United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

ALBERT M. BILLIETRI

Plaintiff

v.

SUMMONS

UNITED STATES BOARD OF PAROLE

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon

PHILIP B. ABRAMONITZ

plaintiff's attorney , whose address

76 Niagara Street, Buffalo, New York 14202

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

54

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

PETITION

-vs-

UNITED STATES BOARD OF PAROLE

and

Defendant

COMPLAINT

Plaintiff, ALBERT M. BILLITERI, by his attorney, Philip B. Abramowitz, complaining of the Defendant respectfully alleges:

FIRST: That ALBERT M. BILLITERI is presently incarcerated in the United States Penitentiary at Lewisburg, Pennsylvania.

SECOND: That immediately prior to his incarceration, the Plaintiff was domiciled in Buffalo, New York.

THIRD: That the UNITED STATES BOARD OF PAROLE has been vested with exclusive authority by Congress to determine when an inmate should be placed on parole.

FOURTH: That in a decision and order dated November 26, 1974, this Court ordered that unless ALBERT M. BILLITERI was given a new parole hearing by the UNITED STATES BOARD OF PAROLE within 30 days, ALBERT M. BILLITERI must be discharged from federal custody.

FIFTH: That on December 11, 1974, a parole hearing was held.

SIXTH: At the Board of Parole hearing, the members of the Board of Parole admitted that ALBERT M. BILLITERI was given the classification "O.C." because the Board of Parole considered him to be a member of "Organized Crime".

SEVENTH: The members of the Board of Parole admitted that the designation was given solely on the basis of the allegations contained in the pre-sentence report.

EIGHTH: The designation made in the pre-sentence report was based only

on hear-say, inferences and unsubstantiated allegations.

NINTH: The plaintiff was never given the opportunity to contest the "Organized Crime" designation.

TENTH: At the parole hearing, the members of the Board of Parole indicated that the "Organized Crime" designation would have a significant impact upon Mr. Billiteri's chances for parole.

ELEVENTH: The members of the Board of Parole indicated that the plaintiff, because he was designated "Organized Crime" would be treated differently from other parole applicants.

TWELFTH: The members of the Board of Parole indicated that because Mr. Billiteri was designated "Organized Crime", a different hearing would have to be held.

THIRTEENTH: The members of the Board of Parole at the "hearing" held on December 11, 1974, stated that they had absolutely no power to effectuate the release of ALBERT M. BILLITERI.

FOURTEENTH: The members of the Board of Parole at the "hearing" held on December 11, 1974, indicated that had Mr. Billiteri not been designated "Organized Crime" they would have had the power to order his release.

FIFTEENTH: Upon information and belief, no person designated "Organized Crime" has ever been released on parole by the United States Board of Parole.

SIXTEENTH: The classification of ALBERT M. BILLITERI by the United States Board of Parole as "Organized Crime" is without any basis in fact.

SEVENTEENTH: There is presently no administrative process by which the plaintiff can be given the hearing where he will have the opportunity to contest the "Organized Crime" identification.

EIGHTEENTH: Since there is no present structure for a parole hearing to contest the "Organized Crime" identification, it becomes useless and an exercise in futility to exhaust administrative remedies.

Wherefore, it is respectfully requested that this Court issue an Order (1) Discharging ALBERT M. BILLITERI from Federal Custody; (2) That the procedures used by the Parole Board to classify a person "organized crime" and are in violation of the Due Process and Equal Protection Clauses of the United States Constitution and in violation of the Petitioner's Constitutional Rights to free association; (3) Declaring that the procedure followed in determining whether or not a person should be granted parole once the Board of Parole has classified a person as "organized crime" is in violation of the Petitioner's Constitutional Rights to Equal Protection and Due Process; (4) Declaring that an Advisory Hearing be held immediately to determine whether or not ALBERT M. BILLITERI should be designated "organized crime"; (5) for such other and further relief as this Court deems just and proper.

DATED: Buffalo, New York
December 23, 1974

MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER
PHILIP B. ABRAMOWITZ, Of Counsel
Attorney for Petitioner
Office and P.O. Address
76 Niagara Street
Buffalo, New York 14202
Tel. No. 855-0717

-1-

MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER

Attorneys at Law • 76 Niagara Street • Buffalo, New York 14202 • (716) 855-0717

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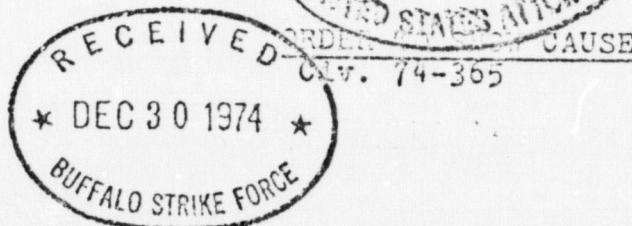
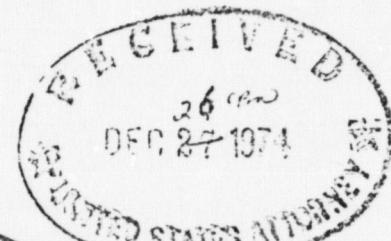
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff
-vs-

UNITED STATES BOARD OF PAROLE

Defendant



Upon the annexed Affidavit of STANLEY J. COLLESANO, sworn to the 16th day of December, 1974, and upon the annexed Affidavit of PHILIP B. ABRAMOWITZ, sworn to the 24th day of December, 1974, and upon the annexed Affidavit of JOSEPH N. POKINSKI, sworn to the 9th day of December, 1974, and upon all the prior pleadings and proceedings had heretofore herein let the UNITED STATES BOARD OF PAROLE show cause at a Special Term of this Court to be held on the 3 day of January, 1975, at the United States Courthouse, City of Buffalo, New York, at, 12 o'clock in the noon of that day or as soon thereafter as counsel may be heard, why ALBERT M. BILLITERI should not be discharged immediately from Federal Custody on the grounds that the BOARD OF PAROLE has failed to comply with the Order of this Court dated November 26, 1974.

ORDERED that service of these papers upon BENNIS O'KEEFE on or before the 26 day of January, 1975, shall be deemed good and sufficient service.

ENTER: Buffalo, New York

Dec 24, 1974

John T. Carter
JTC
USDCS

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

-vs-

AFFIDAVIT

UNITED STATES BOARD OF PAROLE

Defendant

STANLEY J. COLLESANO, being duly sworn, deposes and says:

1. That I am an attorney at law and a member of the firm of MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER.

2. On December 11, 1974, I appeared at the Parole hearing held pursuant to the Order and Judgment of this Court dated November 26, 1974 in the case of Billiteri -vs- United States Board of Parole, Civil Action 74-365.

3. At that Board of Parole hearing, the members of the Board of Parole admitted that Albert M. Billiteri was given the classification "O.C." because the Board of Parole considered him to be a member of "Organized Crime".

4. The members of the Board of Parole admitted that the designation was given solely on the basis of the allegations contained in the pre-sentence report.

5. The designation made in the pre-sentence report was based only on hear-say, inferences and unsubstantiated allegations.

6. The plaintiff was never given the opportunity to contest the "Organized Crime" designation.

7. At the parole hearing, the members of the Board of Parole indicated that the "Organized Crime" designation would have a significant impact upon Mr. Billiteri's chances for parole.

8. The members of the Board of Parole indicated that the plaintiff, because he was designated "Organized Crime" would be treated differently from other parole applicants.

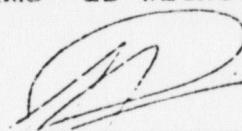
9. The members of the Board of Parole indicated that because Mr. Billiteri was designated "Organized Crime", a different hearing would have to be held.

10. The members of the Board of Parole at the "hearing" held on December 11, 1974, stated that they had absolutely no power to effectuate the release of Albert M. Billiteri.

11. The members of the Board of Parole at the "hearing" held on December 11, 1974, indicated that had Mr. Billiteri not been designated "organized Crime", they would have had the power to order his release.

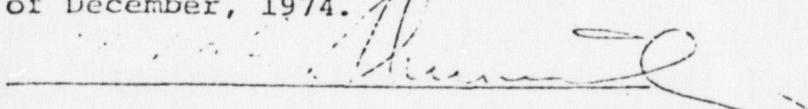
12. Upon information and belief, no person designated "Organized Crime" has ever been released on parole by the United States Board of Parole.

13. The classification of Albert M. Billiteri by the United States Board of Parole as "Organized Crime" is without any basis in fact.



STANLEY J. COLLESANO

Sworn to before me this 16 day
of December, 1974.



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

-vs-

AFFIDAVIT

UNITED STATES BOARD OF PAROLE

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE }ss:
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, being duly sworn, deposes and says:

FIRST: That I am an attorney at law duly licensed to practice before this Court with my offices located at No. 76 Niagara Street, Buffalo, New York.

SECOND: That I am fully familiar with all the facts and circumstances of the instant case.

THIRD: That on November 26, 1974, the HON. JOHN T. CURTIN issued an Order "Mandating that the Defendant [United States Board of Parole] discharge the Plaintiff from Federal Custody unless within thirty days the United States Board of Parole reconsiders his application for release..."

FOURTH: The thirty day time limit will expire on December 26, 1974.

FIFTH: That on December 9, 1974, JOSEPH N. POKINSKI of the United States Board of Parole filed an Affidavit, which I received on December 20, 1974, and which is attached hereto and made a part hereof.

SIXTH: That JOSEPH N. POKINSKI claims in his Affidavit

that a hearing held on December 11, 1974, was "in compliance" with the HON. JOHN T. CURTIN's order. However, JOSEPH N. POKINSKI admits, as STANLEY J. COLLESANO alleged in Paragraph "10" of his Affidavit, that "the members of the Board of Parole at the hearing held on December 11, 1974,... had absolutely no power to effectuate the release of ALBERT M. BILLITERI."

SEVENTH: That JOSEPH N. POKINSKI further states in his Affidavit that the United States Board of Parole's next regional meeting "will take place on January 13, 1975...At that time, the Board will decide the appropriate action to be taken..."

EIGHTH: That the only excuse given for the failure to comply with Judge Curtin's thirty day time limit was the problem of the "distances involved." (See Affidavit of JOSEPH POKINSKI.)

WHEREFORE, it is respectfully requested that this Court order that ALBERT M. BILLITERI be immediately discharged from Federal Custody on the grounds that the UNITED STATES BOARD OF PAROLE has failed to comply with this Court's order of November 26, 1974, mandating that a recommendation be had within 30 days.

Philip B. Abramowitz

Sworn to before me this
24th day of December, 1974.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK



ALBERT M. PELLETIER

Plaintiff

vs.

UNITED STATES BOARD OF PAROLE

Defendant

Upon the annexed Affidavit of STANLEY J. COLLESANO, sworn to the 16th day of December, 1974, and upon the annexed Affidavit of PHILIP B. ABRAMOWITZ, sworn to the 23rd day of December, 1974, and upon the annexed Affidavit of JOSEPH N. POKINSKI, sworn to on the 9th day of December, 1974, let the UNITED STATES BOARD OF PAROLE, at a Special Term of this Court to be held on the 3 day of January, ¹⁹⁷⁵ at the United States Courthouse, City of Buffalo, New York, at 10 o'clock in the noon of that day or as soon thereafter as counsel may be heard, show cause why the relief designated in the Complaint should not be granted, and it is further

The Clerk shall cause to be served
ORDERED that service of these papers upon ~~James O'Brien~~ on or before the 26 day of December, 1974, shall be deemed good and sufficient service.

ENTER: Buffalo, New York

*This action is hereby consolidated
with CIV 74-365*

*John Berlin
R/S DCJ*

Dec 4 1974

MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER

Attorneys at Law • 76 Niagara Street • Buffalo, New York 14202 • (716) 825-0717

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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Plaintiff

-vs-

AFFIDAVIT

UNITED STATES BOARD OF PAROLE

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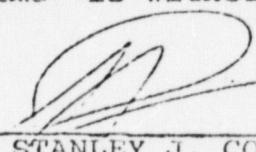
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WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

-vs-

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COUNTY OF ERIE)ss:
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1. I am the Administrative Examiner of the Northeast Region of the U. S. Board of Parole with offices at Scott Plaza No. 2, Industrial Highway, Philadelphia, Pennsylvania.

2. I have been apprised of the order of the Honorable John T. Curtin, U. S. District Judge for the Western District of New York on November 26, 1974, regarding the case of Albert M. Billiteri, Register No. 87332-132 vs. U. S. Board of Parole.

In compliance with that order the Northeast Regional Director, Curtis C. Crawford, ordered an Examiner Team to conduct a parole hearing for Mr. Billiteri on December 11, 1974, at the United States Penitentiary at Lewisburg, Pennsylvania.

3. Mr. Billiteri's case has previously been designated by the Board as an original jurisdiction case pursuant to 28 C.F.R. S.17. In accordance with that regulation the five Regional Directors of the Board are required to make the determination regarding parole by reviewing the summary of the December 11 hearing. Because of the distances involved the Regional Directors review all original jurisdiction cases at their quarterly meetings. The next meeting will take place on January 13, 1975 at their North Central Region, Kansas City, Missouri. At that time the Board will decide the appropriate action to be taken as a result of the December 11 hearing.

DATE: 12/19/74

Subscribed and sworn to before me this 9 - day of December, 1974. *Eva M. Dasso*


JOSEPH N. POKINSKI
Administrative Examiner
U. S. Board of Parole, Northeast Region
Philadelphia, Pennsylvania 19113

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3. Sometime thereafter it came to the attention of Government counsel that the proceeding was, in fact, bifurcated and that the hearing of December 11th was to be conducted by a hearing examiner who would thereafter transmit his findings, conclusions and recommendations to the Board of Parole, which was and is scheduled to meet in Kansas City on January 13, 1975. The hearing did, in fact, occur on December 11th as recited in the Plaintiff's several affidavits, and recommendations have apparently been forwarded to the full Parole Board which is scheduled to meet in Kansas City on January 13th.

4. The Government believes that it has, in fact, complied with the Court's Order of November 25, 1974. That Order directed the Board to reconsider Billiteri's parole eligibility within thirty days. The Board is in the process of reconsidering Billiteri's parole eligibility and, in fact, the Government respectfully submits that this reconsideration is both actual and substantial compliance with the letter and the spirit of the Court's mandate. Therefore, that portion of the complaint and Show Cause Order which seeks relief on the grounds that the Government has failed to comply with the Court's Order of November 25th should be in all respects denied with leave to renew or amend, if the Parole Board should hereafter fail to complete its reconsideration in a timely fashion consistent with the Court's mandate.

continued on next page

5. In the alternative, the Government urges upon the Court the consideration that a copy of Mr. Pokinski's affidavit, dated December 9, 1974, (a copy of which is contained in the Plaintiff's moving papers) was transmitted to both the Court and the Plaintiff on December 19, 1974, together with a letter from Government counsel stating that Government counsel believed that the course of action undertaken by the Parole Board was in compliance with the directive of this Court. The Government respectfully urges upon the Court that, if counsel for Billiteri felt that this was not actual or substantial compliance, counsel was obliged to come forward seasonably

7 cont.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

(15)

ALBERT M. BILLITERI :
-v- : CIV. 74-365
UNITED STATES BOARD OF PAROLE : (Consolidated with
: CIV. 74-580)

GOVERNMENT'S PRELIMINARY ANSWER

THE UNITED STATES OF AMERICA by and through its attorneys, John T. Elfvin, United States Attorney for the Western District of New York, and Dennis P. O'Keefe, Department of Justice Attorney, hereby makes the following preliminary response to the complaint and Orders to Show Cause dated December 24, 1974:

1. On November 26, 1974, this Court issued an Order directing the release of Albert M. Billiteri ". . . unless within thirty days the United States Board of Parole reconsiders his application for release in a manner consistent with this opinion." The Opinion indicated that certain factors should enter into the Board of Parole's determination of parole eligibility and that it is necessary and desirable to have a statement of the essential facts upon which the Board's rulings are based. The Court noted the Parole Board had apparently been originally operating under the erroneous assumption that Billiteri had been convicted of both conspiracy and extortion whereas he had, in fact, pleaded guilty to a single count which charged him with conspiring to violate the Extortionate Credit Transaction Act.

continued on next page

2. Upon receiving the Order of this Court, the Government transmitted it, on November 27th, to Joseph A. Barry, Esquire, General Counsel for the United States Parole Board. The Parole Board immediately undertook to comply with the Court's mandate and a parole hearing was scheduled for December 11, 1974.

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and so advise both the Court and the Government, so that remedial action could have been instituted in a timely fashion to endeavor to correct any alleged deficiency. Indeed, not only did the letter of December 19th place counsel on notice as to the precise posture of the matter, but counsel admits in the several affidavits presently before the Court that what counsel describes as a "Parole Hearing" was held pursuant to an order of this Court on December 11th. It is apparent from Mr. Collesano's affidavit that he became aware that the hearing was bifurcated on or before December 11th, yet the Plaintiff's counsel took no action to seasonably register objection to the manner in which the Parole Board was proceeding with the reconsideration until Christmas Eve, the day before the expiration of the 30-day deadline. Hence, even if the Court deems that the Government has not actually or substantially complied with the terms of its mandate, the Government respectfully urges that the ultimate sanction not be imposed because (1) there has been no suggestion of bad faith on the part of the Government and (2) under the doctrine of laches the defendant ought to be estopped in this civil proceeding from complaining of a contrived injustice which he himself has been aware of for some two weeks but chose to take no action to correct until the time in which it could have been correct has expired.

6. The most recent pleading raised an issue which is completely new and foreign to the original application -- namely, an objection to the "organized crime" designation assigned to Plaintiff Billiteri. Government counsel has undertaken to ascertain from the Parole Board whether, in fact, such a designation exists and, what, if any ramifications accompany such a designation. The Government requires a reasonable period of time to review the facts and circumstances surrounding this issue. In addition, the Government has requested a transcript of the proceedings of the parole hearing in order to ascertain whether counsel for the Plaintiff seasonably raised an objection to the "Organized Crime" classification

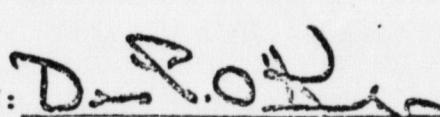
at the "parole hearing" and whether the Plaintiff made any effort to present or request an opportunity to present information in refutation of the "organized crime" designation.

7. In addition, the Government requests sufficient additional time in which to ascertain exactly what happened at the hearing on December 11th; and the Government wishes to exercise its rights of discovery under the new complaint to ascertain from Mr. Billiteri and others facts necessary as proper to demonstrate that a designation of "organized crime" is completely appropriate and proper.

WHEREFORE, in response to the several Show Cause Orders and the Complaint, the Government respectfully submits herewith this preliminary response. In regard to the first issue of the Government's compliance with the Court's Order of November 26, 1974, the Government requests a delay of one week in order to correctly ascertain all the facts and present a more complete Answer. With regard to the second issue, the so-called "organized crime" designation applied to Plaintiff, Billiteri, the Government requests an additional period of thirty (30) days so that it may fully and completely ascertain the facts and exercise its discovery rights. The Government also requests such additional and further relief as the Court may find necessary in the interests of justice.

Respectfully submitted,

JOHN T. ELFVIN
United States Attorney

BY: 
DENNIS P. O'KEEFE
Department of Justice Attorney

DATED: January 3, 1975

AT: Buffalo, New York

(16)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

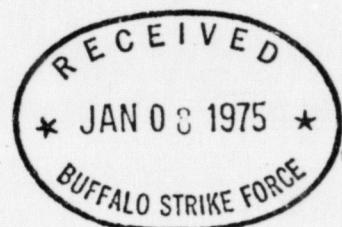
ALBERT M. BILLITERI

-vs-

UNITED STATES BOARD OF PAROLE, et al.



Civ- 74-365
Civ-74-580



SIR: Take notice of an ORDER, of which the within is a copy, duly granted in the within entitled action on the 6th day of January, 1975, and entered in the Office of the Clerk of the United States District Court, Western District of New York, on the 6th day of January, 1975.

Dated: Buffalo, New York

January 6, 1975

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

TO: Philip B. Abramowitz, Esq.
Attorney for Plaintiff

TO: John T. Elfvin, Esq.
Attorney for Defendant

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

-vs-

Civil 74-365
Civil 74-580

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

ORDER
~~RECEIVED~~

CURTIN, DISTRICT JUDGE

74

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

-vs-

Civil 74-365
Civil 74-580

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

APPEARANCES: PHILIP B. ABRAMOWITZ, ESQ.
Buffalo, New York, for Plaintiff.

JOHN T. ELFVIN, ESQ.
United States Attorney (DENNIS P. O'KEEFE,
ESQ., Department of Justice Attorney, of
Counsel), Buffalo, New York, for the
Government.

By previous order of the court dated December
24, 1974, these two actions were consolidated. Both
actions are directed at the same proceeding conducted
by the defendant on December 11, 1974.

Civil 74-580, the newer action, challenges the
practice of the defendants regarding prospective parolees
allegedly classified as "OC," or, more specifically,
"organized crime." The complaint alleges that the plain-
tiff's right to due process is violated by such a classi-
fication, and that it is a further violation of his rights

when such a classification requires that the Regional Board of Parole, normally a reviewing body, considers his application as one of original jurisdiction.

Civil 74-365 is the former proceeding. The plaintiff seeks to enforce the court's order of November 26, 1974, which required that

... the defendant discharge the plaintiff from federal custody, unless within thirty days the United States Board of Parole reconsiders his application for release in a manner consistent with this opinion.

The plaintiff alleges that the proceeding conducted by an examiner panel on December 11, 1974 was not a reconsideration within the meaning of the order because that panel had no authority to act in light of the allegedly improper "OC" label attached to the plaintiff's application. The plaintiff prays for discharge from custody.

This court recognizes that judicial review of Parole Board action is a relatively recent phenomenon. The rules and practices of the Parole Board have changed dramatically in recent months as well. However, this court still has the obligation to protect the rights of citizens when the acts of any authority exceed the

limitations imposed upon it by law. Furthermore, the court has the power to see its orders enforced. The representatives for the government have requested additional time to assemble the data necessary to respond to the allegations of the plaintiff. It would be unreasonable not to grant the application for delay. However, on Thursday, January 16, 1975 at 2:00 p.m., the parties are directed to appear before me again. At that time the defendants shall produce a transcript of the proceedings held in the matter of the plaintiff's parole application on December 11, 1974. Furthermore, the defendants are directed to respond to the allegations raised in the moving papers of the plaintiff in a manner most likely to apprise the court of the substance of their defense.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: January 6, 1975

17.

Law Offices of
MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER

76 NIAGARA STREET

BUFFALO, NEW YORK 14202

STANLEY J COLLESANO
SALVATORE R. MARTOCHE
JACK J GELLER
PHILIP B ABRAMOWITZ
LINDA L CLEVELAND

TELEPHONE 855 0717
AREA CODE 716

O'Keefe - Please see
me.

January 22, 1975

Hon. John T. Curtin
U.S. Court House
Buffalo, New York 14202

Re: Albert M. Billiteri v.
The U.S. Board of Parole

Dear Judge Curtin:

Enclosed please find a copy of the Affidavit in the above-referenced case. The original is being filed with the Court.

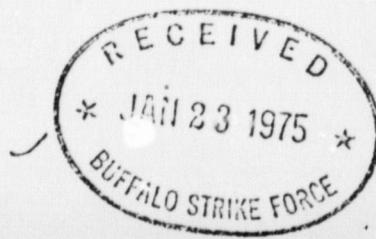
Yours very truly,

Philip

Philip B. Abramowitz

PBA:cm

CC: Clerk of the Court
Albert M. Billiteri
Dennis O'Keefe



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

CIV-1974-365
1974-580

-vs-

THE UNITED STATES BOARD OF PAROLE

Defendant

STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

PHILIP E. ABRAMOWITZ, being duly sworn, deposes and says:

FIRST: I am an attorney at law duly licensed to practice before this Court, and I am fully familiar with all the facts and circumstances of the above referenced cases.

SECOND: This Affidavit is submitted to clarify and supplement the comments which I made before this Court on January 17, 1975.

THIRD: At oral argument, in response to a question by the Court, I indicated that I had seen the pre-sentence report of ALBERT M. BILLITERI. However, my review of the report occurred only after the December 11, 1974 hearing was held. It was informally and confidentially shown to me by a person who had access to it. I was never in any position to challenge its accuracy or significance before the Board of Parole.

FOURTH: The Board of Parole in its answer to the Complaint in Civ-1974-580 admitted the allegations contained in Paragraphs "Sixth", "Seventh" and "Tenth". Those Paragraphs stated that:

"Sixth: at the Board of Parole Hearing, the members of the Board of Parole admitted that Albert M. Billiteri was

given the classification 'O.C.' because the Board of Parole considered him to be a member of organized crime." "Seventh: The members of the Board Parole admitted that the designation was given solely on the basis of the allegations contained in the pre-sentence report." and "Tenth: at the Parole Hearing, the members of the Board of Parole indicated that the 'Organized Crime' designation would have a significant impact upon Mr. Billiteri's chances for parole."

FIFTH: Since neither at the time of the hearing nor prior to the hearing did counsel for Mr. Billiteri have the opportunity to even review the pre-sentence report, to at least judge its accuracy, the hearing of December 11, 1974, is constitutionally defective under the doctrine of fundamental fairness and Masiello vs. Norton, 364 F. Supp. 1133 (1973).

SIXTH: That by the Government's own admission, the transcript of the hearing of December 11, 1974, is "poor". Thus, no agency would be able to intelligently make any decision by reviewing what had transpired at the hearing below.

SEVENTH: That in Bowles vs. Baer, 142 F. 2d 783 Judge (later Justice) Minton speaking for the Seventh Circuit stated that it is essential in an administrative hearing that the parties be permitted "to record the proceedings or be provided with a record by the hearing body." 142 F. 2d at 789.

EIGHTH: In this case, counsel, in reliance upon the Government assumed that they would be provided with "a record". However, because of its poor quality no real record was provided.

NINETH: That Judge Minton further states "if findings of fact and an order are made, they (the parties) are entitled to be furnished copies." No such copies of any findings by the hearing examiners were furnished, if indeed there were any findings made.

TENTH: That if the hearing "held on January 13, 1975, be deemed an Appellate Hearing the decision must be vacated because there was nothing that could be reviewed,

nor any meaningful opportunity to challenge the basis for the findings below Gonzales v. U.S., 348 US 407, see also U.S. v. Stewart, 478 F2 106 (2d Cir. 1973).

ELEVENTH: That if it be considered an "original" hearing Plaintiff has been denied his right to due process and equal protection, because he was specifically denied the right to have his attorney or himself present.

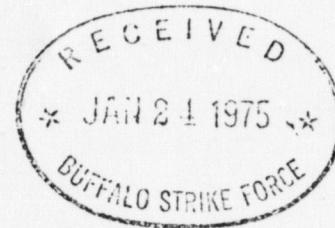
TWELFTH: Whether the hearing held on January 13, 1975 be considered an appellate hearing or an original hearing, Plaintiff was denied his right to due process and equal protection because neither he nor his attorney were permitted to appear there and to in any manner discuss with, assist, or argue with the Board members as to the validity of the allegations in the pre-sentence report which were exclusively relied on, by the panel in denying Mr. Billiteri his parole. (See paragraph 3 of Affidavit of Curtiss Crawford) That is to say the Sine qua non of the Board's denial of Mr. Billiteri's parole, as expressed in paragraph 3 of Mr. Crawford's Affidavit, are the allegations contained in the pre-sentence report whose accuracy and significance, Plaintiff and his attorney have never even been permitted even to discuss with the Board.

THIRTEENTH: The Grand Jury minutes attached to the Government's answering papers are irrelevant as they form no part of the proceedings before the board, and can not be released without a Court order.

Philip B. Abramowitz

Sworn to before me this day of , 1975.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



ALBERT M. BILLITERI

Plaintiff

AFFIDAVIT

-vs-

CIV 74-365
74-580

THE UNITED STATES BOARD OF PAROLE

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, being duly sworn deposes and says:

FIRST: That I am an attorney licensed to practice before this court and I am fully familiar with all the facts of the above-referenced case.

SECOND: Attached herewith and made a part hereof is a two page Affidavit with five pages of attachments which I received on January 23, 1975, from Francis DiMento, Esq. of Boston, Massachusetts.

THIRD: As can be seen from the papers attached hereto Mr. Ilario Zannino, an inmate of the Lewisburg Penitentiary and a client of Francis DiMento, Esq., was considered by the Board of Parole to be an "Organized Crime" figure (see notice dated October 8, 1974).

FOURTH: As a consequence of his "O.C." status he was scheduled for

"A hearing before the entire Board [because] the Regional Directors assumed original jurisdiction". (see notice dated December, 12, 1974 of the United States Board of Parole)

FIFTH: The hearing before the entire Board was held on January 14, 1975 at 9:00 a.m. in Kansas City, Missouri where Mr. Zannino's attorney Francis DiMento, Esq. was permitted to participate on behalf of his client. (see letter dated December 16, 1974, from Board of Parole and Affidavit Dated January 22, 1975 of Francis DiMento, Esq.

SIXTH: However, I was specifically denied the right to attend the hearing in Kansas City to represent my client Mr. Albert M. Billiteri. (see letter dated January 8, 1975 attached hereto and made a part hereof).

SEVENTH: The refusal by the Board of Parole to permit me to represent my client at the hearing in Kansas City while permitting Mr. DiMento to represent his client in Kansas City ~~has~~ denied my client the right to "equal protection" as guaranteed by the United States Constitution.

Philip B. Abramowitz

Sworn to before me this _____ day of January, 1975.

AFFIDAVIT

Boston, Massachusetts

January 22, 1975

I, Francis J. DiMento, hereby on oath depose and say as follows:

1. I am an attorney admitted to practice law in the Commonwealth of Massachusetts and various Federal Courts including the Supreme Court of the United States.

2. In the course of my representation of one Ilario Zannino, I appeared in his behalf before examiners of the United States Parole Board at the United States Penitentiary in Lewisburg, Pennsylvania in August 1974. At that time, after presentation of Mr. Zannino's case for parole, the two examiners advised that the case would be referred to Philadelphia as an "Original Jurisdiction case."

3. Thereafter, Mr. Zannino received the Notice of Action dated October 8, 1974, a photocopy of which is attached hereto.

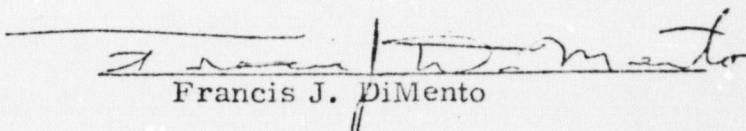
4. Thereafter, Mr. Zannino received the two-page Notice of Action on Appeal dated December 12, 1974, a copy of which is attached hereto.

5. Thereafter, by letter dated December 16, 1974, I was advised of a hearing before the entire National Appellate Board, to be held on January 14, 1975. A copy of that letter is attached hereto. It is in the same form as originally received by me, except that the note at the lower right concerning the telephone number of Mr. Emery was affixed thereto by me after receipt of the letter. Attached to the letter was a copy of the two-page Notice of Action on Appeal, dated December 12, 1974, hereinabove referred to.

6. Although the letter of December 16, 1974 indicated that a reply was necessary only if I should be unable to attend, I nevertheless confirmed my intention to attend by letter dated December 27, 1974. A photocopy of my file copy of that letter is attached hereto.

7. Shortly after I arrived at the designated office in Kansas City, I was ushered into a large conference room and introduced to the members of the Board. As I recall, seven members were present. I asked a few questions designed to elicit the basis for the denial of my client's parole, but was told that the hearing was being held solely for the purpose of my

presentation of all facts I thought relevant to Mr. Zannino's request for parole. I then proceeded to present those facts orally for a period of about 45 minutes. I spent the greatest part of that time, of course, in attempting to rebut an "organized crime label" which had been affixed to Mr. Zannino. At the end, there were questions from about three members of the Board, which I answered. The hearing then concluded. On the next day, at my office in Boston, I received a telephone communication that the full Board had determined to make "no change" in Mr. Zannino's status.

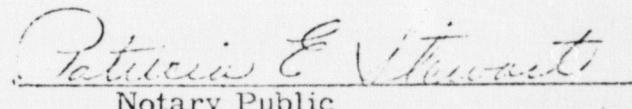

Francis J. DiMento

COMMONWEALTH OF MASSACHUSETTS

Boston, Massachusetts

January 22, 1975

Then personally appeared the above-named Francis J. DiMento and made oath to the truth of the foregoing, before


Patricia E. Stewart

Notary Public

My Commission expires: 5/17/79

United States Department of Justice
United States Board of Parole
Washington, D.C. 20537

December 16, 1974

Mr. Francis J. DiMento
Attorney at Law
100 State Street
Boston, Mass. 02109

Re: Ilario Zannino
Reg. No. 38336-133

Dear Mr. DiMento:

Reference is made to Mr. Zannino's appeal
of November 5, 1974.

The National Appellate Board has now taken
action scheduling his case for a hearing before the
entire Board. Mr. Zannino will not be present at that
meeting. His case is scheduled for consideration at
9 a.m., Tuesday, January 14, 1975, at the Board's
Regional Office at Kansas City, Missouri, which is
located near the airport.

Please advise should you be unable to parti-
cipate in this hearing.

Sincerely yours,

Claude S. Nock, Jr.

Claude S. Nock, Jr.
Executive
National Appellate Board

cc: Regional Director
North Central Region
KCI Bank Building
8807 Northwest 112th St.
Kansas City, Mo. 64153

*See
John Val Enney*
416-243-5696

Encl.
Copy Notice of Action
Copy of Order



United States FEDERAL BUREAU OF INVESTIGATION
Washington, D.C. 20537
945 AM 11/74

Notice of Action

Name ILARIO ZANNINO

Register Number 38336-133 Institution Lewisburg

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Continue to Expiration

Conditions or remarks:

Reasons: Your offense behavior has been rated as very high severity. You have a salient factor score of 8. You have been in custody a total of 27 months. Guidelines

Reasons for denial, continuance or revocation: (Use separate sheet if necessary) established by the Board for adult cases which consider the above factors indicate a range of 36-45 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration appears warranted because of the magnitude of the offense and information received from the Justice Department regarding your involvement in organized crime.

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

- A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.
- B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.
- C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.
- D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

October 8, 1974

(Date Notice sent)

(Region - Specify)

NFB
(Docket Clerk)

National Appellate Board

X
(Check)

OPY

87

December 27, 1974

United States Department of Justice
United States Board of Parole
Washington, D. C. 20537

Attention: Claude S. Nock, Jr.
Executive - National Appellate Board

Re: Illario Zannino
Reg. No. 38336-133

Gentlemen:

This will confirm that the undersigned will represent
Mr. Zannino at the hearing to be held at 9:00 a.m., Tuesday,
January 14, 1975, at the Board's Regional Office at Kansas
City, Missouri.

Sincerely,

Francis J. DiMento

FJD:pes

8.8



UNITED STATES DEPARTMENT OF JUSTICE

United States Board of Parole

Washington, D.C. 20537

DEC 16

1 21 PM '74

Notice of Action on Appeal

Name ILARIO ZANNINORegister Number 38336-133 Institution Lewisburg

REGIONAL APPEAL: The appeal by the above-named has been carefully examined by the Regional Director(s) and the following was ordered:

 Affirmation of the previous decision. Reversal or modification of the previous decision, as follows: An institutional hearing during the month of _____ A regional appellate hearing before the Regional Director.

You have a right to appeal this order to the National Appellate Board. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole (or his equivalent), within 30 days of the date shown below.

NATIONAL APPEAL: The appeal by the above-named has been carefully examined by the National Appellate Board and the following was ordered:

 Affirmation of the previous decision. Reversal or modification of the previous decision as follows: An institutional hearing during the month of _____ A rehearing at the regional appellate level:

A hearing before the entire Board (applicable only in cases where the Regional Directors assumed original jurisdiction). See attached sheet.

All decisions by the National Appellate Board on appeals are final.

December 12, 1974

(Date Notice sent)

{Region specify}

NFB

(Docket Clerk)

National Appellate BoardXXX

(Check)

INMATE COPY

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Case of: Ilario Zannino
Reg. No. 38336-133

Notice of Action on Appeal

Order:

The National Appellate Board pursuant to C.F.R. 2.27 finds that Zannino is properly classified as an Original Jurisdiction case. Further, the National Appellate Board finds that his appeal from the October 8, 1974 initial Original Jurisdiction decision qualifies him for an "Appeal of Original Jurisdiction cases," hearing under C.F.R. 2.27(a). It is therefore ordered that Ilario Zannino be scheduled for an Appeal Review hearing by the entire Board on January 14, 1975.

December 12, 1974.



UNITED STATES DEPARTMENT OF JUSTICE
ORGANIZED CRIME AND RACKETEERING SECTION
WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

DPO:am

Buffalo Field Office
921 Genesee Building
Buffalo, New York 14202

January 8, 1975

Patrick Glynn, Esq.
Assistant Counsel
United States Board of Parole
320 First Street, N.W.
Washington, D. C. 20537

RE: Billiteri v. U.S. Board of Parole
Civil Nos. 74-365 and 74-580
(Consolidated)

Dear Mr. Glynn:

In accordance with our telephonic conversation of Wednesday, January 8, 1975, I am enclosing a copy of Judge Curtin's Order of January 6, 1975. If I am to properly represent the Board in complying with the Court's Order, I must have a transcript of the proceedings of December 11, 1974 as soon as possible. I will also need a copy of the Board's decision on Billiteri as soon as possible after the decision is rendered.

I would further like to note that in accordance with your instructions, I am notifying Mr. Philip Abramowitz, attorney for Billiteri, that he may not attend the Hearing in Kansas City on January 13, 1975.

Very truly yours,

DENNIS P. O'KEEFE
Department of Justice Attorney

cc: Hon. John T. Curtin
U.S. District Judge

Mr. John K. Adams
U.S. District Clerk

Philip B. Abramowitz, Esq.
76 Niagara Square
Buffalo, N.Y. 14202

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(19)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

CIV. 74-365 & 74-580

- v -

THE UNITED STATES BOARD OF PAROLE,

Defendant

BOARD OF PAROLE'S ANSWER
TO THE PLAINTIFF'S AFFIDAVIT
RECEIVED JANUARY 24, 1975.

On January 24, 1975 the Board of Parole, through its attorney, received an Affidavit of Philip B. Abramowitz, Esq. which recited the fact that in another case, a case involving one Ilario Zannino, Zannino's attorney, Francis DiMento, Esq., was permitted to and did appear at a hearing in Kansas City on January 14, 1975 before the entire Board of Parole.

I made inquiry relative to this matter and determined that the case of Ilario Zannino was an appeal from an original ruling. (See copy of letter of Claude S. Nock, Jr. of December 16, 1974 attached to Plaintiff's Affidavit wherein it is clear the hearing was on appeal.) In appeals cases Counsel may be present: see United States Board of Parole regulation 2.27(b). There is no similar provision in the regulations for appearance by Counsel where, as in this case, no final determination was made on the regional level. Here Billiteri's case was referred to the National Board for an original determination. This was not an appeal and, therefore, regulation 2.27(b) did not apply.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney

BY: Dennis P. O'Keeffe
DENNIS P. O'KEEFE
Department of Justice Attorney

DATED: January 27th, 1975

AT: Buffalo, New York

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

-v-

CIV. 74-365
(Consolidated with
CIV. 74-580)

UNITED STATES BOARD OF PAROLE

GOVERNMENT'S RESPONSE TO THE COURT'S
ORDER OF NOVEMBER 26, 1974, TO THE
PLAINTIFF'S COMPLAINT AND ORDERS TO
SHOW CAUSE OF DECEMBER 24, 1974 AND
TO THE COURT'S ORDER OF JANUARY 6, 1975

THE UNITED STATES OF AMERICA, by and through its
attorneys, Richard J. [redacted] United States Attorney for the
Western District of New York, and Dennis P. O'Keefe, Department
of Justice Attorney, hereby makes the following response to the
Court's Order of November 26, 1974, to the plaintiff's Complaint
and Orders to Show Cause of December 24, 1974 and to the Court's
Order of January 6, 1975:

COMPLAINT

Directing its attention to the plaintiff's civil complaint
of December 23, 1974, the Government answers as follows:

Allegations (1) through (7) and (10)
are admitted;

Allegations (8), (9) and (11) through
(18) are denied.

TRANSCRIPT

Next the Government notes that a copy of the transcript
of the parole hearing of December 11, 1974 is attached in accordance
with the Court's Order of January 6, 1975. (See Exhibit A.) The

quality of this transcript is poor as the Government advised the Court and the plaintiff on Tuesday, December 14, 1974, and for this the Government submits its apologies to the Court as well as to the plaintiff.

FACTS AND ARGUMENT RELATIVE
TO THE COURT'S ORDER OF
NOVEMBER 26, 1974

1. On November 26, 1974, this Court issued an Order directing the release of Albert M. Billiteri ". . . unless within thirty days the United States Board of Parole reconsiders his application for release in a manner consistent with this opinion." The Opinion indicated that certain factors should enter into the Board of Parole's determination of parole eligibility and that it is necessary and desirable to have a statement of the essential facts upon which the Board's rulings are based. The Court noted the Parole Board had apparently been originally operating under the erroneous assumption that Billiteri had been convicted of both conspiracy and extortion whereas he had, in fact, pleaded guilty to a single count which charged him with conspiring to violate the Extortionate Credit Transaction Act.

2. Upon receiving the Order of this Court, the Government transmitted it, on November 27th, to Joseph A. Barry, Esquire, General Counsel for the United States Parole Board. The Parole Board immediately undertook to comply with the Court's mandate and a parole hearing was scheduled for December 11, 1974.

3. Sometime thereafter it came to the attention of Government counsel that the proceeding was, in fact, bifurcated and that the hearing of December 11th was to be conducted by a hearing examiner who would thereafter transmit his findings, conclusions and recommendations to the Board of Parole, which was scheduled to and did meet in Kansas City on January 13 and 14, 1975.

The hearing did, in fact, occur on December 11th as recited in the plaintiff's several affidavits, and recommendations were forwarded to the full Parole Board which met in Kansas City on January 13th and 14th. (See copy of the Board's decision relative to the plaintiff's application for parole attached as Exhibit B.)

4. While the plaintiff alleges that he was advised at the hearing of December 11, 1974 that a decision would be rendered within 15 days, this is only a partial truth. The bottom of page 17 of the transcript (Exhibit A) indicates that the hearing examiners told the plaintiff that he might not get a decision until January '75 because the case was being referred to the Regional Director. Also, Billiteri was officially notified, on December 18, 1974 (See Exhibit C), that his case had been referred to the Regional Director for a decision.

The Government herewith submits to the Court the affidavit of John F. Sicoli, Senior Analyst for the Northeast Region, of January 8, 1975 (Exhibit D). This affidavit clearly states that the Board felt that by holding the hearing of December 11, 1974 they had complied with this Court's Order of November 26, 1974, and it is apparent from reading the affidavit that there was never any intent not to comply.

6. In view of all of the above, (1) the fact that the Government believed that by holding the hearing within the thirty (30) day period it would be in compliance, (2) the fact that at the hearing of December 11, 1974 the plaintiff was advised that the case was being referred to the Regional Director and might not be decided until January, (3) the fact that on December 18, 1974 Billiteri was notified that his case was being referred to the Regional Directors, and (4) because the Board, as set forth in Sicoli's affidavit of January 8, 1975, believed that they were in compliance with the plaintiff's Show Cause Order and Complaint

of December 24, 1974, the plaintiff's petition for release of plaintiff, Billiteri, should be denied, as the Government submits that there was both actual and substantial compliance of the Court's Order of November 26, 1974. The most that can be said for the plaintiff's position is that there may have been an innocent misunderstanding by the Government as to the specific requirements of the Court's Order of November 26, 1974.

FACTS AND ARGUMENT RELATIVE TO
PLAINTIFF'S COMPLAINT AND SHOW CAUSE
ORDER OF DECEMBER 24, 1974 AND THE
COURT'S ORDER OF JANUARY 6, 1975 AND
THE ORGANIZED CRIME DESIGNATION ISSUE

Turning now to the "Organized Crime" or O.C. designation issue and to the issue of the propriety of the hearing of December 11, 1974, the Government submits the following:

A review of the transcript of the parole hearing of December 11, 1974, while admittedly of extremely poor quality, does reveal the following:

(a) The original mistake wherein Billiteri was considered to have pleaded guilty to conspiracy (18 U.S.C. 371) and extortionate extensions of credit (18 U.S.C. 891, et seq.) was corrected and it was determined that Billiteri had pleaded guilty to conspiracy (18 U.S.C. 371) to violate the Extortionate Extensions of Credit Transactions Act (18 U.S.C. 891, et seq.). (See transcript, Exhibit A, last paragraph of page 5 and the top half of page 6 to approximately the middle of the page.)

(b) Billiteri was given an opportunity to explain his part in the conspiracy to make extortionate extensions of credit, and, when questioned specifically as to threats to the victim, denied that threats were made. This denial is in direct contradiction to the Grand Jury testimony which was the basis for the indictment in this case. (See bottom half of page 6 of the transcript of December 11, 1974 and the top half of page 7.)

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Also, see a copy of the Grand Jury testimony of Bernard Spaziani attached as Exhibit E.)

(c) Billiteri was given an opportunity to give his version of the facts leading to his former convictions. (See the bottom half of page 8 of the transcript and the top portion of page 9.)

(d) Billiteri was questioned as to his educational background and vocational training. (See bottom portion of page 9 and the top portion of page 10.)

(e) Billiteri was questioned as to his background, marital status, health and personal habits. (See page 10 of the transcript.)

(f) Billiteri was advised that he had been given an organized crime (O.C.) designation and was given an opportunity to challenge such a designation and to present countervailing arguments. While denying any ties to organized crime, Billiteri offered no evidence or positive argument to refute the propriety of the O.C. designation. (See bottom half of page 11 of the transcript and pages 13, 14 and 15.)

(g) Billiteri was questioned as to his future plans. (See page 12 of the transcript.)

(h) Finally, Billiteri was advised that a tentative decision had been made to forward his case to the Regional Director and that a final decision might not be forthcoming until January. (See bottom half of page 17 of the transcript.)

In summary then, and once again apologizing for the quality of the transcript, the parole hearing resolved the earlier mistake and clearly established that Billiteri had pleaded guilty to Conspiracy. Billiteri was given an opportunity to give his version

of the facts surrounding this and prior convictions. With regard to this conviction, Billiteri's denial of threats to the victim is refuted by the testimony of Bernard Spaziani who testified that he was threatened and was beaten by Pasquale Napoli (the other defendant in this conspiracy indictment) in the presence of Billiteri. Billiteri was questioned generally as to his educational background, training, marital status, health and future plans. Finally, Billiteri was advised that he had been given an organized crime designation, was given an opportunity to present countervailing arguments, and was given the tentative decision that his case was being referred to the Regional Director and that a final decision might not be reached before January.

With regard to the question of the O.C. designation then, it would appear that the parole hearing of December 11, 1974 was in compliance with the guidelines established in Masiello v. Norton, 346 F.Supp. 1133 (U.S.D.C. D. Conn. 1973) wherein the Court said at page 1137:

The Court's conclusion that Masiello's parole hearing was not consistent with due process does not, on remand, require a "trial-type" supplemental proceeding. But he should be alerted to the fact that his prison file jacket carries an "organized crime" designation, be informed that in all likelihood his case will be referred for an en banc consideration, and be afforded an opportunity, consistent with the prevailing parole hearing procedures, to answer and present countervailing arguments so that the examiners and the Board will have a complete record upon which to base a reasoned judgment.

WHEREFORE, in response to the Complaint and Show Cause Orders of December 24, 1974 and to the Court's Orders of November 26, 1974 and January 6, 1975, the Government submits:

The Board of Parole has Shown Cause as required by the Orders of December 24, 1974, and by its actions has complied with the Court's Orders of November 26, 1974 and January 6, 1975; therefore, plaintiff, Billiteri, should not be released from custody.

Respectfully submitted,

RICHARD J. ARCARA
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK

BY: Dennis P. O'Keefe
DENNIS P. O'KEEFE
Department of Justice Attorney

DATED: January 16, 1975

AT: Buffalo, New York

BILLITERI, Albert M.

Reg. No. 87332-132

Legend

Mr. W. ----- Mr. Wrenn, examiner
Mr. Q. ----- Mr. Quirk, examiner

Mr. C. ----- Mr. Collesano, Attorney, (appearing for
Mr. Abromowitz)

Mr. B. ----- Mr. Billiteri (Inmate)

Guide for other markings used

Exam. ***** examiner's voice not distinguished

Mr.? ***** could not distinguish voice of party
speaking

Ellipsis ***** speaking voice not understandable

Dash ***** no comments being made or sentence not
completed.

BILLITERI, Albert M.
Reg. No. 87332-132

December 11, 1974
U.S.P., Lewisburg, Pa.

This is Mr. Collesano my attorney

Mr.C.: I am appearing for Mr. Abromowitz who is actually Mr. Billiteri's attorney

This is Mr. Wrenn and My Name is Quirk we are examiners of the Board of Parole.

Actually we hear the case

This actually a parole hearing.....

Lets except this as a rehearing and it will be an initial rehearing.

It is a second hearing

I understand it to be a new hearing.

We will consider it an initial hearing.

..... after that, we will ask you to leave the room while Mr. Wrenn and I discuss the case, and we will call you back we will give you a tentative decision. The decision will be reviewed at our regional office and you will get the official decision hopefully within 15 working days barring emergencies.....

Mr. B: I am familiar with the circumstances, sir

Mr. Q:on the record

Mr. B. I wonder sir, if I may ask, is it possible to have a copy of this report that you are reading my record, primarily because there was an error in the----well actually why I am here I was judged as being on a conspiracy and extortion, really I am here under 371 conspiracy this was the basis -- one of the basis for this re-hearing the order of the re-hearing

Mr. Q.: The hearing that we are holding today is on the basis of your plea as far as we are concerned guilty of count one

Mr. B.: That's right.. I was judged the last time along with count one for extortion

Mr. Q.: the court on the count in which you were convicted we do have to use our judgement on what happened..... considering the whole case. But we are recognized.....appeals was apparent mistake.....that you were convicted of charges not only conspiracy but extortion. We are considering the conspiracy and will consider the facts of that as I am now about toyou. I will get involved.....and we will consider the whole story. Even though you are convicted of just one count Briefly MR. B.

Mr. Q.: Continued
of this charge how you became involved

Mr. C.: Excuse me just one second but I think what Mr. B. was asking -- He was asking to take a look at to take a look at the file because there was error made previously and we..... and we feel that may be additional errors and what he is asking for before the hearing give him an opportunity to take a look at his file.

Examiner: We have no authority toat his file sir. This report is strictly a court report released by the court.

Mr. C.: Not understandable

MR. ? : I was just going to say as far as the parole file goes he has all information in the parole except the presentence report

not understandable

Mr. ?

Q: Where are your copies?

Mr. B.

A: I have them

Why don't you go back and get them?

MR. C.:..... you saying that he has everything that is in the file?

Exam: Except for the presentence report. We have no authority to release the presentence report.

Mr. B.: this summary is why I am here, what I have accomplished since I have been here, my attitude since I have been here, with whom I am going to live when released the fact I have a detainer it states that I have an extensive record. (I think I have covered about everything, don't you think)

Not understandable

Mr. ? : You probably have the same copy as I have

MR. ? : That's right

Mr. B?: Along with other it looks like a pretty thick file in comparison to what I have

Exam: The presentence report is in here, and a lot of institution papers pertaining to your case-----

Mr. ? : Mr. Quirk would you appreciate why I asked this question the fact that I am here because ofindictment which is conspiracy

Mr. Q.: Which we are taking under consideration as the basis of this hearing

Mr. B.: right, that's right, but however in view of an error of me being here on just conspiracy I am being judged along with extortion could it possibly be

Mr. C.: I think it might be if we had a copy of the court order Mr. Quirk , indicating-----

Mr. ? : Would you bring us a copy of the court order?

Mr. ? : Do you have a copy

Mr. B.: I could surely go and get it.

not understandable

Mr.Q.: Is that your wishes at this point? Think this will be helpful

Mr. B.: No No, Mr. Wren suggested that I get a copy of the court order.

Mr. Q.: Yea, in response really to.....

Mr. B.: Actually there is nothing in there that says that I should ~~shew~~ get a copy of the --- what you are judging me on. If that is what your question is.

Exam. The question that you are bringing up is that you feel that we are mostly judging your case.....

Mr. B. No I did not say that sir

Exam: We can correct this by getting a copy of the court order. And determine here and now how you were sentenced. All right

Mr. B? As far as me accusing you of judging.....I did not say that.

Mr. Q.: If you will go and get a copy of the court order I think we will.....

Mr. B.: That's right sir, there is a play on words here I was just answering a man for what he said.

Exam: Well it was you that made the point

Mr. C.: I think anyone wouldsame..... He is not saying that there is an error going on right now. He said that there was error before. And that error was.....conspiracy and extortion possible if there were other errors committed there there would be evidence in the file. And what we wanted to do was to take a look at the file. Which in view of the previous.....it doesn't seem to me to be an unreasonable requestthe .. apparently.....the file but yet I heard you say that there were a lot of other institutional papers in here.

Exam: Well these are normal.....

Exam 2?: Classification material and that sort of thing which doesn't have anything to do with the offense itself
Mr. C.: Well on the classification material if it is there it is there.

Exam: This is medical data, educational data the classification material it doesn't have any thing to do with presentence report.

MR. C.:.....

Exam: Mr. Q.: Well the presentence report is not available to

Mr. C.: I realize that and I realize the position I have.

Mr. B. You see sir I dont know that unless I ask is that correct?

Mr. Q: I don't know but I told you that it isn't. So you know now.

Mr. B.: I know now since I have asked
Explain the presentence report though.

Mr.C.: It has been said that Mr. B. gets a copy of everything in that file though

Exam: I don't think we said that he gets a copy of everything.....

Mr. C. So we can safely say that he doesn't have everything in that file.

Exam : No sir he doesn't

Mr. Q: He does have a copy of the

Not understandable

.....there are two court orders , one is the sentencethe other is the recent order

Mr. C.: I was relating to the original court order on which basis he was sentenced

not understandable

Mr. ?: the indictment is very explicit to extortion 371
pardon me I mean Conspiracy 371

Mr. C.: Is it resolved we want to see the court order

Exam: We are trying to give you as much information as we can.

not understandable

Mr. C.: In so far as looking at the file we are not in agreement, but I gather you are prepared to let us look at the institutional record in the file---with exclusion of the presentence report.

Exam: We are prepared to allow him look at that information that has been presented to him and you may look at that information that has been presented to him.

Mr. C:.....I don't think it is necessary for us to look through that. Why don't we proceed.....

Mr. Q: Well tell us about count one Mr. B. That's the one of which you stand convicted indicates again the information that we havewith conspiracy and it involves loans to certain people and also indicates conspiracy-- I presume.....of.....you remember what happenedbetter than we do. What was the situation-----

Mr. B. What happened in court, sir?

Mr. Q: No, what were you charged for what were you actually found guilty of.

MR. B.: I was found guilty of conspiracy 371

Exam: ? : Tell us about it sir, that what we are interested in

Mr. B: Well to tell you about it there isn't really that much to tell, I could go and get myin compliance..... you had to go in to a great deal of-----.

Mr. Q. : Well just a moment sir, let me read you what I have---the basis

Mr. ?: That would be a good idea.

Mr. Q.: On the basis of count one. perhaps the will I am reading this from the presentence report not from the official papers.....copy from the official papers.....

between about June 1, 1968 and about July 15, 1969 did unlawfully conspire together and with other unknown people to knowingly, wilfully make extortion and extensions of credit (defined in 18 USC 891 (6)) and loans wherein the under standing of the defendants and the debtors Bernard Spazinanni, Donald A. Tonhaus and Joseph P. LaPorta that delay in repayment for failure to repay could result in the use of violence and other criminal means as to cause harm to the person reputation, or property of the aforementioned debtors, in violation of 18 USC 892. Also, in the same period, the defendants did conspire to use extortionate means of any kind against the debtors to collect or attempt to collect extortionate extensions of credit or to punish the debtors for nonpayment of extortionate extensions of credit, in violation of 18 USC 894. In support and furtherance of said conspiracy and objectives of defendants, six overt acts enumerate the joint meeting of the defendants or the single meeting of defendant Billiteri at various locations in the Buffalo area, on July 15, August 19, 1968, June 23, June 28 and July 2, 1969, with debtors Bernard Spazinanni and Joseph P. LaPorta; all in violation of 18 USC 371.

Mr. Q: That is what is listed as the count.

Mr. B. Count one sir is 371 conspiracy now you mentioned----
.....now you see in compliance with rule 11 ... to

Mr. C.: If I may be permitted.----The question is-----
You are asking Mr. B to explain -----

Exam: It is not what we are trying to do. Just explain what happened
.....We got to consider honest. We are not going to say
guilty of conspiracy. We want to know what happened so we get an
appreciation of your role in the case.

not understandable

Exam: Conspiracy is the offense of discussing, it is not the
commission of the crime itself. The crime in this case is the
.....conspiracy getting together to discusswith some
overt act taking place. Overt act could be a phone call, it
could berecking a car too... In this particular instance I
believe it was number of conversations. I think that is what you
are referring to.

Mr. C. : There was no extortion that took place.

Exam: Well I am not saying there was MR. C.

Exam: I am trying to explain as plain as I can that Mr. B. here
is convicted of conspiracy. Now we agreed on that.

Mr. C. Right

Exam: Will you tell us then Mr. B. What was the conspiracy? and
What was your involvement in it?

Mr.now it does I think you have been very clear in this
last portion. The question didn't translate that clearly to me.

Exam: yea, we are not litigating in court. What did you do Mr.B.
you did something -----

Mr. B.: Well I did-----about this situation
we did conspire to loan money.

Exam: Did you loan the money?

Mr. B.: Irecord states..... now we come back to, you see, we
come back to this compliance with rule 11 where it ties us in.
In order to take a plea you have to comply with rule 11.
Is that correct? This is where the discrepancy lies.

Not understandable

Mr. B.:

Yes, we did --we did conspire to loan some money. We did actually
loan some money

Mr. Q:the conspiracy was to loan money and you did loan
money.

Mr. B.: As the record states there I met him-----I made a phone call and met LaPorta on a couple different occasions as I recall. And that is about the extent of it sir.

Mr. Q: The meetings were of some purpose or what happened to the money-----

Mr. B.: possibly, possibly

Mr. B.: It has been quite sometime

Mr. Q.: Let me ask you if I may a couple of questions. Any threats made against Spazianni, or Tonhaus.

Mr. B. : No sir

Mr. Q: You know if you don't pay-----that sort of thing.

Mr. B. No sir

Mr. Q: This really is the information I am looking for----- If I understand you correctly now it is true that you and agreed or conspired to loan money to certain people and you remembered these people-----.....as a retainer. But that there was no threats made or nothing like that to bad cooperation or, any thing like thatconspiracy.

Let me ask you this, Mr. B. You were represented by counsel at that time. Was this arrangement or was it a decision that youto plead guilty to count one.....

not understandable

Mr. B.: As I recall, now it has been two and a half years

Mr. Q: What happened to Mr. Napoli?

Mr. B. He was granted parole, he got three years, he was granted parole after 15 months from Allenwood

Mr. Q.: Is there any reason you yourself can.....the fact that why he 3 and you got five?

Mr. B. No, I can't possibly give you a reason sir

Mr. Q.:indicate why there was a difference in sentence But you did get five years and a non.....fine of \$10,000.00

Mr. R: Right

Mr. Q:at your record and again there is something that you don't know there is a detainer presently on file refering to a charge inwhich I understand has already been settled and you got a four term with that offense which runs concurrently with this sentence.

Mr. B.: Yes sir

Mr. Q: and there are no other detainers that you know

Mr. B.: no sir

When will that sentence be up Mr. B.

Mr. B. 1976

Mr. Q.: 1976, but you know when

Mr. B: Well I would say July, I got sentenced there July 5 I think I got sentenced there maybe 5 days later maybe on the 10th. that was July of 72 so I guess July of 76.

Mr. Q: Were you sentence on that before you started your federal sentence.

Mr. B. No Sir

Mr. Q.: You went out on writ on that did you

Mr. B.: No I started my Federal sentence, Iwas sentenced by the State.

Mr. Q: Did you go back to Buffalo for that sentence

Mr. B.: No no, I committed myself --I was committed rather and in Buffalo is we don't have federal detention it is a county detention and I stayed there and five days later I went to court and five days later went to court and was sentence for that.

Mr. Q: before you got here

Mr. B. right

I am sorry if I don't understand you sir

Exam Mr. Q: Don't worry about that.....

This particular type----this is the first time you have been involved in this type.....

Mr. B. : I was convicted of conspiracy in 46

Mr. Q: was thatthe internal revenue laws

Mr. B.: That's right

not understandable

Mr. Q.: Any other time

Mr. B. One other time in 1950 I was found guilty of.....

MR. Q.: That was an 18 month sentence, you served that one

Mr. B. Yes I did sir

Mr. Q.: Have you been incarcerated on any other occasion

Mr. B.: Yes one time

Mr. Q: Any other convictions that were not followed by incarceration. any fines.

Mr. B.: I might have some fines. I can't recall..... and I just got a copy of myreport just the other day. I guess youappreciate my being a little bit up tight and thatmemory.

Mr. Q: You get the instructions and not read them when you got it?

Mr. B.: Instructions and not read them, yea they certainly do read them.

Mr. Q: there is a.....on there so you have to look at them rather carefully.

Mr. Q.: Mr. B you are 48 years old now right sir

Mr. B.: Yes sir

Mr. Q.: I understand you completed the requirements for GED

Mr. B. Yes sir

That is since you have been here right,

Mr. Q: When did you get your certificate?

Mr. B.: As I recall I think it was this spring. I took the test the early part of the year. I don't recall if it was just before I met the last board or just after that I took the test.

Mr. Q: But it was this year

Mr. B. Yea

Mr. Q: Let us follow up on that a little, What is your program?

Mr. B.: That was my program

Mr. Q: What are you doing now? your assignment you on.

Mr. B.: I have been working in mechanical services I was awarded medium custody back in October 18 and was transferred over to mechanical services

Mr. Q.: Is your conduct record in shots?

MR. B.: No shots whatsoever sir.
No disciplinary action whatsoever

Mr. Q.: You completed your academic program. Were you programmed at all in the vocational

Mr. B.: No

Mr. Q.: Do you belong to any of the organizations here?

Mr. B.: Yes, I belong to the Holy Name Society, Toastmasters

Mr. Q.: Do you hold office in any one of them?

Mr. B.: No sir

Mr. Q.: Turning again to some of the things that went on or have taken place in your life time. What do you do for a living?

Mr. B.: I have been a contractorconstruction all of my life.

Mr. Q.: Have you been in military service at any time?

Mr. B.: No sir

Mr. Q.: Are you married?

Mr. B.: Yes sir.

Mr. Q.: Is the marriage still in tact?

Mr. B.: Yes sir, this is my wife and my children here. I have one other boy.

Mr. Q.: Have you ever used drugs?

Mr. B.: No sir,alcohol ever sir

Mr. Q.: Have you had any psychiatric problems emotional problems that requiredof consultation or treatment?

Mr. B.: No sir

Mr. Q.: I will ask you then just one question, then Mr. Wrenn I am sure will have some questions for you. Going back to the top line of conspiracy, What is the why in that Why did you become involved?

Mr. B.: That's a good question, and I can't answer it----

Mr. C.: Perhaps it is pretty difficult for Mr. B. to discuss-.....
.....

Mr. B.: That's got nothing to do with it. He asked me the why I don't know why. How do you answer a question like that?

Mr. Q.: Where you in need of money? Was it a one shot affairpeople know why. don't know why you did it but at the time you had a reason. I am just trying to solicit from you something a little bit more than what you did as to why you did it. Why you became involved we much more interested in -----.

Mr. B.: Excuse me for interrupting but I suppose it was for need of money.

Mr. Q.: Did you get any money?

Mr. B.: Chuckle) No sir

MR. Q.: Was your business shakey at this time?

Mr. B.: Yeah

Mr. Q: not understandable

Mr. B.: no, if you.....I'll correct you or attempt to

Mr. Q.:names involved in the other accounts etc. Some reference Mr. B. that indicates that you are involved and what might be called looselyorganized crimehearing as a matter of fact I think the case was referred to an original jurisdiction category because some belief of that. What do you have to say about that?

Mr. B.: Am I involved in organized crime, no sir. To begin with I don't know fully the definition of the word organized crime.

Mr. Q.:the people you are associating with, not only in this-----.

Mr. B.: Well yeah, I think my record has a great deal to do with it, sometimes you say association, sometimes-----well we have a very famousgoing right now that I would consider organized crime if anything.

Mr. Q.: Well let me put it this way.-----Think of it into the rackets.

Mr. B.: I am in no racket sir

Mr. Q.: People that you may have been associated with not necessarily in this but in your background in Buffalo. were you considered or did you think you were being considered a part of a group of people who were in the rackets.

Mr. B.: Well I can answer that very simply, Since I have been I found out I have been stamped special offender or OC organized Crime.

Mr. Q.: You don't see that there is any justification or basis for that as far as your reason is concern?

Mr. B.: No sir

Mr. Q.: Mr. Wrenn would you like to ask-----

Mr. W.: Yes I just have a couple of things to say --. Where you convicted by a strike force?

Mr. B.: No sir

Mr. W.: Out of Where?

Mr. B. Buffalo New York

Mr. W.: Was that strike force the main.....of organized crime in that area?

Mr. B.: I believe so, I can't answer that truthfully.

Mr. W.: Tell us a little bit about what your plans are when you get out.

Mr. B.: I anticipate when I get out-----get my business started my concrete business back again. Naturally stay with my family take care of my family. I have had many problems.....my concreteagain. I figure I will have an overtime job just taking care of my family. But primarily for a livelihood I just might start my concrete business again.

Mr. W.: That is not in operation

Mr. B.: No it is not, that is only thing I know to make a living

Mr. W.: Do you have machinery?

Mr. B.: Well no I don't, any more, no sir

Mr. W.: You going to get financing together and do it all.

Mr. B.: Well it is not so bad, I have been doing a little readingabout the small business.

I talked this over with my last caseworker Mr. Meco, I am now a member of the minority and am eligible for a small business loan so I anticipate making application in that fashion.

Mr. W.: Are you in debt now sir?

Mr. B.: Well I owe fine \$10.000.00, I do owe my family some money. They have been very decent with my wife, my daughter.

Mr. W.: I don't have any other questions

Mr. Q:I ask Mr. B.'s chosen representative or substitute.....for chosen representative.....Please let us remind.....to try the case again. Anything you have to say on behalf of Mr. B. he will appreciate it. We're not in the court room -----

Mr. C.: I understand and I won't dwell on anything at any great length. A couple of points that come to my attention, one is you mentioned whether or not this is conspiracy completely.....

..... I represented Mr. B. at that time----- If I had the answer I would certainly give it to you I don't have the answer and I don't know the answer to it. The other thing I wanted to point out is did he ask Mr. B. why the co-defendant got three years and he got more, well he didn't have the benefit of the presentence report I am sure he will appreciate that he doesn't know why the sentence.....I think a fair answer could be erected. I don't know what Mr..... record is.....

Mr. Q.: Usually at the time of sentencing judge makes some comments-----but not when he sentenced..... the same day.

MR. C.: The other thing that I wanted to mention the fact really unusual is the organized crimeof course there is a question on whether or not he is associated with organized crime. This kind of repugnant to me because we have never had an administrative hearing to determine organized crime classification for Mr. B. Nobody has ever sat down with Mr. B. and said these are facts that we have used to structure our classification of you as an individual in organized crime. And no one given Mr. B. opportunity to.....those things. Apparently there is an organized crime classification on his record.

Exam: We are givinga chance now sir, if he wants to place any information on the record.

Mr. C.: Well he doesn't have benefit of the fact that you have---- This isn't a hearing to determine whether or not he isin organized crime.

Exam: We have a statement perhaps we can share that with you I don't know that there is any reason why we can't.

Not understandable

Mr. B.: At that time sir I don't think the attorneys or anyone had access to-----

Mr. C.:? Some Courts do allow and some don't

Mr. B.: I think it is since I have been sentenced-----

Mr. Q.: Maybe when you get into the organized crime as we are discussing it now it is more forour determination of what decision to make,.....board, we don't intend to label it organized crime at all, just trying to get some information. knows that he was referred for original jurisdiction 113

Mr. Q.: Continued

He now finds that he is a member of organized crime, we are only asking for any information that he might have he says no. Heinformation that we had....

Not understandable

MR. C.:ask questions. number 1 Who prepares that report? Number 2 what is the basis and sources of information? That information is not available. What I am saying is, there is no way for Mr. B. to get a hearing on those assertions . You classify him as organized crime apparently.

Exam: Strike force-----

Mr. C.: That doesn't necessarily mean anything except to say that certain individuals, whoever they might be, have said that he...organized crime, you have classified himwith O.C. on your files he hasn't had the opportunity to talk anybody. Why did you do that, let me have a hearing on why----that O.C. is hurting me. I don't want that there. I mean if you want to be fair,.....I think that O.C. has got to go, because I haven't had the chance to talk to anybody. I didn't talk to anybody who prepared that report. You are basing your decision on what you have in front of you.

Exam: We are not basing a decision, but we will consider that among other things in the decision we will have to make.

Mr. C.: In fact what's happening you are basing your decision part of your decision; based on some information that in a presentence report. And we have never had the opportunity to challange.

Exam: Of course, the court also had that information at the time he was sentenced is that correct.

Mr. C.: Oh, I realize that, but they didn't say they didn't label him O.C. there fore he fell into a particular category.

Exam: We are not labeling him O.C. right here.

Mr. C.: Isn't there an O.C. Classification in his file

Exam: That is a bureau of prisions classification we don't have

Mr. C.: I thoughtis a result of that classification

Exam: Theis that the final decision is made En Banc.

Mr. C.: An ordinary case a case without the O.C. He is facing a different situation based on an O.C. classification an ordinary that is in this institution

Exam: We have other types of offenders that also are designatedpublic interest cases. Long sentences 45 years or more and this sort of thing.

Mr. C.: I understand, I think you understand my point also We object the O.C. Because of what it does to him. And the reason I object because I haven't had the opportunity to even challenge that, there is no way for me to challenge that without a fair hearing.

Exam: We would be happy at this point to supply you with any additional information in terms ofdecision. Also if you would like so medical information..... he hasn't gone into that I know he doesn't want to go into it.

Mr. ?: Tell us about the medical conditions that.....might be referring to.

Mr. C.: My client really doesn't want me to get into that, O.K. particularly when his family is here

Mr. Q.: Mr. B. is it alright for Mr. C to say something or would like your family to stand outside.

Mr. B.: Well I think that there is a letter here from the doctor and it is dated just about a month and a half ago would you say Mr. Cooksey that is in the record there and I think that would explain a good deal of it. We have had a problem going back to when my son was in Viet Nam-----

Not understandable

Mr. C.: Short of the injections that I have made particularly on O.C. classification that's all I have to say, one closing thing, you are asking Mr. B. questions about things that he pled guilty to, there is no question that he committed the act with which he pled the problem that I see, I am convinced the reason why he is not going into great details because his family for one reason but another reason it is very difficult for a man or rehash all of that he is here to forget that and start a new life and I have some difficulty myself talking to him about those.....and I know those are important questions for you.

Exam: it is Mr. B. options to..... I would ask him not but it is his hearing. I would be asking just before he goes out after you conclude, part of our ritual, is there anything further that you wanted to say.

Mr. B.: I appreciate what Mr. C. is trying to say but we are a very close.knit family, and the family would made no difference as far as what I have to say.

Exam: I wouldn't want the implication that you weren't giving us everything then later saying if my family wasn't there-----

Mr. B. No No, I wanted to clear that up. I could appreciate what Mr. C. Is trying to say and I certainly don't want to put any dampers on what you are trying to set up

Mr. Q.: Are you satisfied Mr. B. that you have had every opportunity to try to bring out whatever it is that want to bring out

not understandable

Mr. B.: Well I would appreciate inview of the initial and the purpose of me having this re-hearing the result has been taken me ten months to get back this hearing. Ten months of my life Ten months of long incarceration because had it been that I was properly judged possibly-----in being-----let me state that on my initial hearing the institution also recommended parole to my detainer as they do now. You know how it goes if I were to get paroled from here and go to the state it is a good chance if state felt the government thought that I was a good risk that might give me parole. So we are still talking about 10 months which is a very valuable in a man's life especially when you get up to my years. Now we are coming back to because of the error in judging my case my salient factor score of 6 points be it moderate or whatever it might beconspiracy 371 as I understand it I should do 20 to 26 months at the very worst I am into my 30th month. So now we are still talking you see-----I could have gotten out between 16 and 20 months according to these guidelines. So we are still talking about 10 months of my life actually. And all because of a clerical error or whatever kind of error it was, I think this should be taken underconsideration when you gentlemen decide or as I understood you Mr. Wrenn it is going to be En Banc

Mr. W.: Yes However we will discuss that.....

Mr. C.: You are going to make a recommendation and take it to thegroup and you are going to Give Mr. B. the benefit of that recommendation.

Exam? Oh sure certainly we will have to tell him what our tentative decision is today. As we said it is only tentative

Mr. B.: Yes I can understand I can appreciate that sir, I missunderstood you. You see the last time they gave me no answer and just sent it En Banc.

Exam: If that is what we decide that is what our answer will be today and we won't give you any other answer

Mr. B.: I understand O.K.

Mr. C.: This just points out ~~what you was~~ the point I was making about the O.C. classification that would not be necessary if that O.C. classification wasn't there is that correct.

Exam: If the O.C. classification was not there it would be handled in a different manner, yes

Mr. ?: The only thing is I have a question for you do you have a questions on conspiracy and extortion the difference. I know you gentlemen are probably not lawyers, then maybe you are.

Mr. ?: I understand the fact there is a very fine difference between the two.

Mr. C?: In a conspiracy there has to be somebody you can conspire to is that correct?

Exam: There is not a fine distinction a great distinction the distinction is one of talking about doing something and the other is actually doing it.

Mr. C?: Physcially doing it

Exam: Having the actuall act committed. There is a great difference there. We all talk about doing things, we talk about beating our wives up and we never beat them up, there is a great difference.we get technical and everybody gets confused and that is the reason why the mistake occurred the first time and that is why we are back here again. Any thing else Mr. C.

Mr. C. No I have nothing else

Exam Alright Mr. B if you will stand outside, we will call you back

Exam: Mr. B. Mr. Wrenn and I have discussed the case and I think we have coveredcompletelyinformation. OUR tentative decision is to refer to the regional director..... you get the official decision in 15 working days.....

Mr. B.: Any particular recommendation

Exam: That is all we do is just refer.....

Mr. B. I thought as hearing agents you would have a recommendation

Exam: We do make an alternate decision in the case Mr. B. but we don't give that out because we don't know what will be decided ultimately.

Not understandable

Exam: If he doesn't consider it an O.J., it is strictly in his power, if he doesn't consider it O.J. he will send to you another decision in the case whether it be for continuance or anything else it might be. It is strictly up to the regional whether this is going to be an o.J. or not because you are a special offender. If he decides that you are going to be reviewed O.J. or not by five regional . Then you will receive of that that it is going to happen and that will take place in January If he decides you shouldn't be an O.J. then you get a.....as to whether or not

Mr. B.: I see, O.K. gentlemen, I think we have covered everything

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Exam: Do you have anything else you would like to put in the record?

Mr. B.: No,-----I would like to make parole that's what I would like to put in the record.

STATE OF MISSOURI)
)
 COUNTY OF PLATTE)

APPENDIX A VI T

I, CURTIS C. CRAWFORD, being duly sworn, depose and state as follows:

1. I am the Regional Director of the Northeast Region of the United States Board of Parole, with offices at Scott Plaza II, Industrial Highway, Philadelphia, Pennsylvania.
2. I have examined the file of Albert M. Billiteri, Register Number 87332-132, and find as follows:

Mr. Biliteri was convicted of conspiracy in May, 1972, in the United States District Court for the Western District of New York and received a sentence of five (5) years. Mr. Billiteri was given an initial parole hearing at the United States Penitentiary, Lewisburg, Pennsylvania, on February 14, 1974. Following that hearing his case was designated by the Regional Director as an original jurisdiction case; and on March 11, 1974, the Board's Regional Directors ordered that Mr. Billiteri's imprisonment be continued to the expiration of his sentence.

Pursuant to a court order of November 26, 1974, Mr. Billiteri was given another parole hearing at Lewisburg on December 11, 1974, before a panel of two hearing examiners. Since the case had previously been decided as an original jurisdiction case, it was again referred to the Regional Director for original jurisdiction designation. However, it is the practice of the Board's hearing examiners, in cases which are referred for possible

original jurisdiction designation, to make an alternative decision which will stand as the decision of the Board if the Regional Director should not designate the case as original jurisdiction. At Mr. Billiteri's December hearing, the alternative decision of the examiner panel was to continue the case to expiration.

3. On January 13, 1975, the Board's Regional Directors met for the first time since October 1974. At that time it was agreed that Mr. Billiteri's case would first be considered without reference to the allegations of organized crime association in records. It was further agreed that if the decision was to continue the case to expiration without consideration of the organized crime allegations, the Board Members would not reach the issue of organized crime involvement, since that would be unnecessary for the decision to continue to expiration. Upon reviewing Mr. Billiteri's case in this manner, the Regional Directors rated his offense behavior as very high severity because the offense behavior as described in the presentence report most nearly resembled the offense of extortion, which is in the very high severity category in the Board's paroling policy guidelines. Mr. Billiteri has a salient Factor score of eight. The Board's guidelines indicate a range of 36 to 45 months to be served for such cases with good institutional performance and program prognosis. Mr. Billiteri's mandatory release, as computed at the December 1974 hearing will occur after service of approximately 40 months. After consideration of all factors in the case except the alleged association with organized crime, it was determined that an earlier release was not warranted. Therefore, the Regional Directors on January 13, 1975, ordered that no change be made in the previous order to continue the case to expiration.

4. Designation of a case as original jurisdiction does not prejudice the prisoner's chances for a favorable decision by the Parole Board; it merely changes the voting quorum for the original decision. Prior to 1950 the entire five member Parole Board was required to constitute a quorum for voting on any case. The quorum remained five when the three members of the Youth Correction Division were added in 1950. However, the workload of the Board increased as that such a procedure became unworkable, and in the early 1960s the voting requirements were changed to provide for decisions made on the concurrence of two out of three members. But the Board retained a procedure for deciding certain sensitive cases by a quorum of the entire Board. These "en banc" cases were those involving national security, organized crime, national interest,

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major violence, and long term sentences. When the Board reorganized into regions in 1973 and 1974 the en banc procedure was amended to become the present "original jurisdiction" procedure. The purpose of the increased voting quorum requirements for these cases is not to make parole more difficult to obtain but to protect confidence in the integrity of the Parole Board by assuring that there is a broader based consensus among the Board on cases where there is more likely to be public or private pressure to parole or not to parole. Thus, the original jurisdiction procedure would serve to enable the Board to more confidently deny parole to a prisoner who is a popular public figure or to grant parole to a prisoner who is alleged by law enforcement officials to be a key figure in organized crime. Thus, a prisoner such as Albert Billiteri is appropriately designated for an original jurisdiction consideration by virtue of the mere allegation of organized crime involvement even though that allegation may never be proved or relied upon by the Board in its decision making.

5. Prior to completion of the Parole Board's regionalization in the fall of 1974, Board meetings were conducted each month and there was no substantial delay involved in designating a case for en banc or original jurisdiction consideration. However, after the experience of deferring original jurisdiction decisions to quarterly meetings in October 1974, and January 1975, the Board on January 13, 1975, voted to amend the original jurisdiction procedure so that the five votes will be cast, without a meeting, by the Regional Director in the prisoner's region, the three National Members in Washington, and one additional Regional Director. In this way the delay between the institutional hearing and the decision of the Board in future cases will be no greater for original jurisdiction cases than for cases in which the Regional Director

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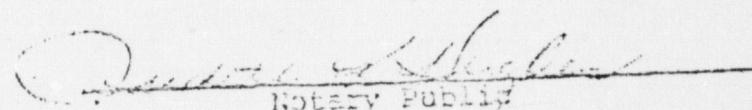
Director seeks review of an examiner panel's decision under
28 C.F.R., Section 2.24.

5


CURTIS C. CRAWFORD
Regional Director, Northeast Region
United States Board of Parole

Kansas City,
Missouri.

Subscribed and sworn to before me this 15th day of
January, 1975.


Daniel W. Nease
Notary Public
A Notary Public within and for
Clay County, Missouri, and counties
adjoining thereto.

MY COMMISSION EXPIRES:

July 17, 1978

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United States Board of Parole
Washington, D.C. 20537

Notice of Action

Name: Albert M. Billiteri

Register Number: 87332-132 Institution: Lexisburg

In the case of the above named, the Board has carefully examined all the information at its disposal and the following action will be taken: parole, parole status, or mandatory release will be denied. No change in previous en banc order--
Continue to expiration.

Conditions or remarks:

Reasons for denial, continuance or revocation (Use separate sheet if necessary)

Your offense behavior has been rated as very high severity. You have a salient factor score of 8. You have been in custody a total of 30 months. Guidelines established by the Board for Adult cases which consider the above factors indicate a range of 36-45 months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision below the guidelines at this consideration is not warranted. Your offense behavior is rated very high because it involved extortion which is in the very high severity category of the Board's guidelines.

Although there is information in your file which alleges involvement in organized criminal activity, the decision to continue your case to expiration was (SEE ATTACHED SHEET)

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this notice was sent.

A. Decision of a Hearing Examiner: Appeal may be made to the Regional Director.

B. Decision of the National Appellate Board referred to it for review: Appeal may be made to the Regional Director.

C. Decision of the Regional Director: Appeal may be made to the National Appellate Board.

D. Decision of Regional Directors in cases where they assumed original jurisdiction: Appeal may be made to the National Appellate Board.

January 15, 1975

Northeast

Region 2

ch

National Appellate Board

0343

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Name: Alber M. Billiteri
Register Number: 87332-132

Institution: Lewisburg

found to be warranted by the other facts in your case, therefore it was not necessary to consider the alleged organized crime involvement in reaching this decision.

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UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

Notice of Action

Name Albert M. Billiteri

Register Number 87332-132 Institution Lewisburg

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered:

Your case has been designated as Original Jurisdiction and referred to the Regional Directors for decision.

Conditions or remarks: _____

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.

B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.

C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.

Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

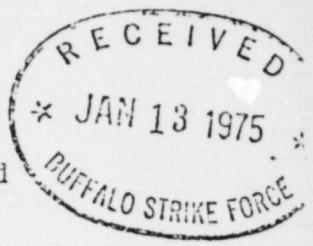
12/18/74

(Date Notice sent)

Northeast
(Region - Specify)

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A F F I D A V I T



I, John F. Sicoli, being duly sworn, depose and state as follows:

1. I am the Senior Analyst for the Northeast Region of the U.S. Board of Parole with offices at Scott Plaza II, Industrial Highway and Tinicum Township, Philadelphia, Pennsylvania.

2. I have examined the file of Albert M. Billeteri, Register No. 87332-132 and find as follows:

On December 6, 1974, the office of General Counsel for the Board of Parole notified this Region of a Court Order from the Honorable John T. Curtin, U.S. District Judge for the Western District of New York, dated November 26, 1974, regarding a suit brought by Mr. Billeteri against the Board. Counsel advised that the Order required a hearing to be held by December 25, 1974, in order to correct a mistake made in the determination of Mr. Billeteri's offense severity rating at his initial parole hearing in February, 1974. 28 C.F.R. 2.20 (d). As a result an Examiner Panel of the Board reconsidered the case at a Parole hearing on December 11, 1974.

Counsel for the Board advised that compliance with the Order could be achieved by providing a hearing before December 25, 1974 although a final decision would be made by the Regional Directors in January at their quarterly meeting.

Original jurisdiction cases are considered at quarterly meetings since the five Regional Director's who make these decisions are located at Philadelphia, Pennsylvania, Atlanta, Georgia, Dallas, Texas, Kansas City, Missouri and Burlingame, California and it, therefore, is impractical to meet to consider every original jurisdiction case after an examiner panel hears one.

Mr. Billiteri's case was designated original jurisdiction on February 25, 1974 by order of the acting Regional Director on

the basis of his review of the summary of the February 1974 hearing and the Board's file including the presentence report. The Board's procedure at 28 C.F.R. 217 A-2, provides that a Regional Director may so act if he has reason to believe persons "may have been professional criminals or may have played a significant role in organized criminal activity."

1/8/75
Date:

JOHN F. SICOLI-Senior Analyst
U.S. Board of Parole-Northeast Region
Philadelphia, Pa. 19113

Sworn to and subscribed to this 8 day of January 1975.

Eva M. Faso
Notary Public

EVA M. FASO, Notary Public
Tiscum Twp., Delaware Co., Pa.
My Commission Expires October 2, 1979

IN THE UNITED STATES DISTRICT COURT
Western District of New York
Before the Federal Grand Jury

UNITED STATES OF AMERICA

-VS.-

JOHN DOE

OCT 13 1970

A circular stamp with a double-lined border. The top half of the border contains the word "RECEIVED" in capital letters, with the "E" partially cut off on the right. The bottom half of the border contains the words "UNITED STATES ATTORNEY" in capital letters, with "UNITED" partially cut off on the left. The center of the stamp contains the date "OCT 13 1970" in a serif font.

Stenographic Transcript of evidence presented before:
THE FEDERAL GRAND JURY OF THE UNITED STATES DISTRICT
COURT for the Western District of New York convened
at the United States Court Building, United States
Court House, Buffalo, New York, on Wednesday, September
2, 1970.

PRESENT:

T. KENNETH SCHROEDER, JR., ESQ.
United States Attorney
BY: DENNIS P. O'REEFE, ESQ.,
Special Attorney.

Appearing for the

UNITED STATES OF AMERICA

RECEIVED
* 1867 DEC 10 1867
C. H. COOPER

1 BERNARD SPASIANA, having been first duly
2 sworn, was examined and testified as follows:

3

4 EXAMINATION BY MR. O'KEEFE:

5 Q. Would you state your name, please?

6 A. Bernard Spasiana.

7 Q. Are you the Bernard Spasiana who was indicted by
8 this Grand Jury for perjury?

9 A. Right.

10 Q. Mr. Spasiana, what is your occupation?

11 A. Barber.

12 Q. What is your business address?

13 A. 410 Oliver Street.

14 Q. Mr. Spasiana, in the spring of 1968, what was your
15 financial condition?

16 A. Broke.

17 Q. Why were you broke?

18 A. Gambling.

19 Q. You were heavily in debt due to gambling losses,
20 is that correct?

21 A. Right.

22 Q. Now, do you have an acquaintance named Joe Laporta?

23 A. Right.

1 Q. Did you tell Mr. Laporta of your financial diffi-
2 culties?

3 A. Yes.

4 Q. What did he say to you?

5 A. He helped me out to try and get some money, said
6 he would.

7 Q. Did he say he had friends who might be able to
8 help you out?

9 A. Right.

10 Q. Did Mr. Laporta come up with some money for you?

11 A. He got a loan for me.

12 Q. How much was that?

13 A. Five hundred.

14 Q. Five hundred dollars. What was the period of time
15 you would have that money?

16 A. Thirty days.

17 Q. Do you know where Mr. Laporta got the money, at
18 that time did you know where he got the money?

19 A. No.

20 Q. What did you have to pay back at the end of thirty
21 days?

22 A. Seven hundred dollars.

23 Q. Did you pay that loan on time, Sir?

Q 1 A. Yes.

Q 2 A. You paid Mr. Laporta the seven hundred dollars?

A 3 A. Right.

Q 4 A. In the fall of 1968, did there come a time again

A 5 you were short of cash?

6 A. Right.

Q 7 A. Did you ask Mr. Laporta for another loan?

8 A. Yes.

Q 9 A. What did Mr. Laporta do?

10 A. He made an appointment with someone else for me

11 to go up and see him.

Q 12 A. Where were you supposed to see this individual or

13 individuals?

Q 14 A. Arab Club.

Q 15 A. Hudson Street, what city is that?

Q 16 A. Buffalo.

Q 17 A. You went up there to see an individual, is that

18 correct?

A 19 A. Right.

Q 20 A. Did you ask for the person's name?

21 A. Right.

A 22 Q. Who did you ask to see?

Q 23 A. Patty.

1 Q. Patty who?

2 A. That's all I knew him by.

3 Q. As Patty?

4 A. Yes.

5 Q. At that time did you ask this man for a loan?

6 A. Right.

7 Q. How much, Sir, did you ask him for?

8 A. Five hundred.

9 Q. Five hundred dollars. Did this man talk to anybody else before he gave you the loan?

10 A. Yes, he talked to another man in another room and come back and give me the loan.

11 Q. Mr. Spasiana, I show you Grand Jury Exhibit Number 10 dated August 12, 1970. Is this a photograph of the man you described as Patty?

12 A. Right.

13 Q. I show you a photograph -- let the record reflect, Grand Jury Exhibit Number 10 is a photograph of Pasquale Napoli. Now, Sir, I show you a photograph which has been marked Grand Jury Exhibit 1, dated August 12, 1970. I ask you, Sir, is that the individual you saw talking to Mr. Napoli before you received your five hundred dollars?

1 A. Right.

2 Q. Let the record reflect that the witness has iden-
3 tified a photograph of Babe Billiteri.

4 Now, Sir, what were the terms of your loan? How
5 much did you ask for?

6 A. Five hundred.

7 Q. They gave you the five hundred dollars?

8 A. Right.

9 Q. Did they say what the interest rate would be, if
10 any?

11 A. Seven hundred. Thirty days.

12 Q. At the end of the thirty days, Sir, were you able
13 to pay that loan?

14 A. No.

15 Q. What did you do then?

16 A. I went up and told him I might be a couple of
17 days late.

18 Q. That was when you were supposed to settle up with
19 him?

20 A. That's correct.

21 Q. What did they say about that?

22 A. They didn't like it. They gave me two days.

23 Q. Did they want more interest?

1 A. Not for the two days.

2 Q. At the end of two days, did you pay them back,
3 Sir?

4 A. No.

5 Q. Now, Sir, during this thirty days you had the loan,
6 had you been up at the Arab Club frequently?

7 A. A few times.

8 Q. Were you gambling there?

9 A. Yes.

10 Q. Did you see Mr. Naples and Mr. Napoli there
11 at times?

12 A. No.

13 Q. Did you talk to them?

14 A. Just hello.

15 Q. Just casual conversation?

16 A. Yes.

17 Q. On one occasion did Mr. Naples ask you how you were
18 doing?

19 A. Yes.

20 Q. What did you say?

21 A. Okay.

22 Q. Now, Sir, you asked for a two-day extention on your
23 loan, is that correct?

1 A. Right.

2 Q. Did you pay that at the end of two days?

3 A. No.

4 Q. What happened then?

5 A. About four days later they came down and worked
6 me over.

7 Q. They came down where?

8 A. My barber shop.

9 Q. "They" refers to?

10 A. Patty and Babe.

11 Q. Pat Napoli and Babe Billiteri?

12 A. Right.

13 Q. Did they come by car?

14 A. Right.

15 Q. Did they pull up in front of your business es-
16 tablishment?

17 A. Right.

18 Q. Did they ask you - -

19 A. They asked me to come out.

20 Q. Did you go in their car?

21 A. In their car.

22 Q. What happened then?

23 A. That's when Fatty threw half a dozen punches at me.

1 Q. Did he say anything to you when he was throwing
2 those punches - -

3 A. "Making a fool out of me," he'll break my head.

4 Q. What did you say?

5 A. He was swearing, "You son of a bitch. You trying
6 to make a fool out of me? I'll break your head."

7 Q. Did he draw blood at all from those punches?

8 A. He drew a little bit out of my lip.

9 Q. What happened then, did you agree to pay off the
10 loan?

11 A. Yes.

12 Q. When did you agree to pay the loan?

13 A. The next day.

14 Q. The next day?

15 A. Yes.

16 Q. Where were you supposed to meet them to pay, that
17 club?

18 A. The Arab Club.

19 Q. Did you go there?

20 A. Yes.

21 Q. Was there a certain time you were supposed to go
22 there?

23 A. Any time that night.

1 Q. Did you go upstairs in the Arab Club?
2 A. No.
3 Q. What did you do?
4 A. He came out and I paid him the money.
5 Q. Did you ask him to come out, a message at the door?
6 A. Yes.
7 Q. You asked for who?
8 A. Patty Naples.
9 Q. Have you been back to the Arab Club since then?
10 A. No.
11 Q. Now, Sir, you were indicted by this Grand Jury on
12 August, 1970, is that correct?
13 A. Right.
14 Q. Has anyone contacted you concerning your testimony
15 before the Grand Jury at all? Did you receive any
16 telephone calls?
17 A. Yes, I received a couple of telephone calls.
18 Q. And what happened?
19 A. Nothing. The first one nobody talked, and the
20 second one they just says, "You better go straight."
21 Q. Do you know who that person was at the end of the
22 line?
23 A. No.
MR. O'KEEFE: Thank you, Sir. Off the record.
(Witness excused.)

21

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

NOTICE OF MOTION

vs.

UNITED STATES BOARD OF PAROLE, ET AL.

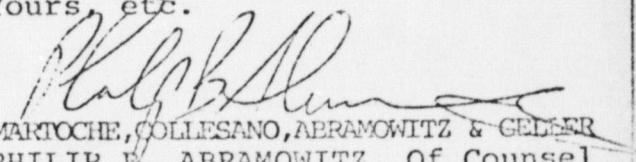
Defendants

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affidavit of PHILIP B. ABRAMOWITZ, ESQ., sworn to on the 18th day of March, 1975, and upon all the prior pleadings and proceedings had heretofore herein, the Plaintiff will move this Court at a Special Term for motions held on the 24th day of March, 1975, for an Order admitting the Plaintiff to bail pending the ultimate disposition by this Court of the instant case at bar.

DATED: Buffalo, New York
March 18, 1975

Yours, etc.


MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER
PHILIP B. ABRAMOWITZ, Of Counsel
Attorney for Plaintiff
Office and P.O. Address
76 Niagara Street
Buffalo, New York 14202
Tel. No. 716-855-0717

TO: DENNIS O'KEEFE, ESQ.
DEPARTMENT OF JUSTICE
GENESEE BUILDING
BUFFALO, NEW YORK 14202

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

Plaintiff

AFFIDAVIT

vs.

UNITED STATES BOARD OF PAROLE, ET AL.

STATE OF NEW YORK)
COUNTY OF ERIE)ss.:
CITY OF BUFFALO)

PHILIP B. ABRAMOWITZ, ESQ., being duly sworn, deposes and says:

FIRST: That I am an attorney duly admitted to practice before this Court and that I am fully familiar with all the facts and circumstances of the above referenced case.

SECOND: That it is now been nearly one year since ALBERT M. BILLITERI's parole application was originally denied by the UNITED STATES BORAD OF PAROLE.

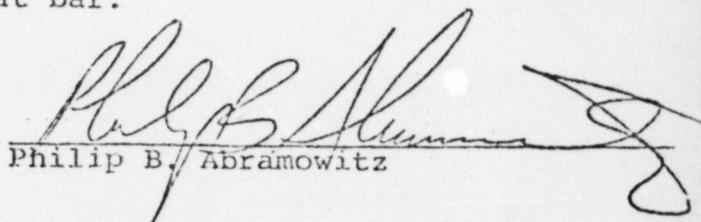
THIRD: That your deponent has always made timely and speedy applications through all the administrative appellate process and judicia process for a speedy determination of the issues herein.

FOURTH: That the inordinate length of time in this case, resulted from the clear errors committed by the United States Board of Parole initially, which required this Court to remand this case for determination, and the length of time required by the Court itself to make determinations.

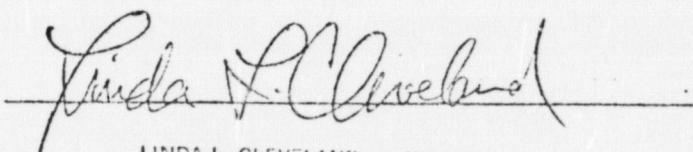
FIFTH: That your deponent at every stage in the proceedings has proceeded forthwith speedily and in an attempt to resolve these matters as quickly as possible.

SIXTH: That there is a clear possibility that this Court will grant the relief ultimately requested.

WHEREFORE, it is respectfully requested that this Court issue an order admitting the Defendant to bail pending the determination of the ultimate issues of the case at bar.


Philip B. Abramowitz

Sworn to before me this
18th day of March, 1975.



LINDA L. CLEVELAND - #4516398
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

KELLY
1975
U. S. BOARD OF PAROLE
HEGAN

ALBERT M. BILLITARI.

Plaintiff

v.

Civ-74-363
Civ-74-369

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

APPEARANCES: PHILIP D. ADDAMASSE, Esq.
Buffalo, New York, for Plaintiff.

RICHARD J. ARNUZZI, Esq.
United States Attorney (JAMES P. O'KEEFE,
Esq., Department of Justice Attorney, of
Counsel), Buffalo, New York, for the
Government.

Both of these actions, consolidated by an order
dated December 24, 1974, concern the same subject matter—
the parole of Albert M. Billitari. Billitari was sen-
tenced to a term of five years in 1972 by the late Chief
Judge John O. Henderson after entering a guilty plea to
a violation of the general conspiracy statute, 18 U.S.C.
§ 371. After completion of one-third of his term,
Billitari became eligible for parole and was afforded

an initial parole hearing in February of 1974. Parole was denied and after administrative remedies were exhausted, Civ-74-265 was commenced.

In that case, it was clear that the parole release determination made by the United States Board of Parole (hereinafter Board) was based on erroneous information regarding Billiteri's conviction. Because the error went to the heart of the Board's stated reasons for denying parole, the proceeding was deemed arbitrary and capricious. In a decision and order dated November 26, 1974, I directed that Billiteri be afforded a reconsideration by the Board within thirty days or be released on parole. Billiteri v. United States Board of Parole, 385 F. Supp. 1217 (1974).

On December 11, 1974, Billiteri appeared with counsel before an examiner panel of the Board at Lewisburg Federal Correctional Institution. At that hearing numerous topics relevant to the subject of parole were discussed. Although the transcript of the examiner

panel hearing in very poor in quality, an apparent effort to address the subjects alluded to in the order of November 26, 1974, is manifest.

The examiner panel, however, did not apprise Billiteri of its conclusions because an original jurisdiction/organized crime (hereinafter OJ/OC) designation had had a part in the prior parole release determination. As a result, Billiteri was informed that the matter would have to be referred to the Regional Board of Parole as an original jurisdiction case (see Exhibit A annexed to the Government's answer of January 16, 1975). The panel did tell Billiteri and his lawyer that they would forward a tentative decision to the Regional Board which would become effective should the Regional Board decide to discontinue Billiteri's case as one of original jurisdiction.¹

As Christmas Day approached no further word was communicated to Billiteri or his lawyer regarding the actions of the Board. The court's order of November 26, 1974, however, mandated the release of Billiteri

on parole if the Board failed to consider his application within thirty days. (Emphasis added.) Counsel for Billitori, having concluded that the Board's failure to reach and communicate a decision within the thirty days violated the court's decree, filed an order to show cause in CIV-74-363 praying for Billitori's release. At the same time a new proceeding was commenced, CIV-74-380, challenging the office designation. The actions were consolidated and the return was scheduled for January 6, 1975.

On the date of the return the United States Attorney, representing the Board, requested an adjournment of ten days. The Government contended that the intervening Christmas and New Year's Day holidays had hindered the collection of information necessary to form a national response. Furthermore, the Government informed the court that the Regional Board of Parole was scheduled to meet in Kansas City, Missouri, on January 12, 1975, to consider Billitori's case. Therefore, in an

order dated January 9th, a ten-day extension was granted, with instructions to the Government to begin compiling the information necessary to make a substantial return on January 16, 1975.

In light of the information regarding the prospective hearing, counsel for Billitteri requested leave to appear before the Regional Board of Parcels at their meeting scheduled for January 13, 1975. In a letter dated January 9, 1975, leave to appear was denied by the Board. Billitteri was also not scheduled to be present.

On January 13th the Regional Board met as scheduled and denied Billitteri's application for release. The affidavit of Curtis Crawford, the Regional Director of the Northeast Region of the United States Board of Parcels, together with the transmittal notice of decision dated January 13, 1975, (both making up Exhibit B of the Government's answer of January 16, 1975) outlined the basis of the decision to continue Billitteri to the expiration of his five year term.

At the Regional Board's meeting it was decided that Billitoi's application "would first be considered without reference to the allegations of organized crime association in records. It was further agreed that if the decision was to continue the case to expiration without consideration of the organized crime allegations, the Board members would not touch the issue of organized crime involvement" (Exhibit B, at page 2.) The Board assigned Billitoi a salient factor score. Salient factors include educational history, family history, criminal history, release plans, etc. Billitoi's score of 3 was on the high end of "good." Billitoi's offense behavior was classified as very high severity. Although the crime of conspiracy in itself not listed among the categories of offense behavior, the Board reasoned that "because the offense behavior as described in the pre-sentence report most nearly resembled the offense of extortion, which is in the very high severity category" that is where Billitoi belonged.² The

Board's guidelines indicated a range of 36 to 48 months to be served for a person with a violent factor score of eight and an offense behavior in the very high severity category. With thirty months of incarceration behind him, Billitori was below even the minimal guideline release date. Therefore, the Board's final decision was to continue Billitori to the expiration of his term.

The question which this court must resolve is whether this reconsideration by the Regional Board satisfies the mandates of the order of November 25, 1974.

Clearly, the court's order of November 25, 1974, emphasized the need for reasoned approaches in parole release determinations. This court refused at that time to substitute its own judgment for that of the Board. It was desirable to allow further administrative consideration in light of a previous error. What emerges from the reconsideration, however, is in many respects worse than that which came before.

The precise manner in which the Board could reconsider the application was left to them. commendably.

They began at the beginning with an examiner panel hearing on December 11, 1974. But the transcript of that hearing is almost worthless (Exhibit A annexed to the Government's answer of January 16, 1975). The only bits of information discernable are scattered references to the subjects discussed at that hearing.

The examiner panel recommended a decision, but the basis of their determination is unknown because their report and decision was not submitted to the court. The panel's decision, however, was obviated when Billiteri's case remained one of ej/oc pursuant to the directive of the Regional Director dated December 10, 1974 (Exhibit C annexed to the Government's answer of January 16, 1975). In addition, there is no indication that the Regional Board placed any reliance on the examiner panel's decision or, for that matter, on any of the spotty data developed at the December 11, 1974, hearing.

The Regional Board was, in effect, starting from ground zero on January 10, 1975. They disclaimed

any need to consider the ej/cs designation because they were able to reach an adverse determination without it. But the designation has a hollow ring.

The ej/cs designation was clearly on the minds of the examiner panel at the December 11, 1974, hearing. They confronted Billitori and his attorney with the organized crime allegations contained in the presentence report prepared in 1972. Apparently neither Billitori nor his attorney had seen the report and were surprised by its introduction at the hearing.³ Some discussion of the organized crime allegations took place but because of the nature of the transcript and the events which followed, it is difficult to discern what value this discussion had.

From the affidavit of Regional Director Crawford it seems that "a prosecutor such as Albert Billitori is appropriately designated for an original jurisdiction consideration by virtue of the mere allegation of organized crime involvement even though that allegation may never be proved or relied upon by the Board in its decision making." (See Exhibit D, at page 4.) It

follows that the examiner panel's discussion of this subject with Billitari and his lawyer was an exercise in futility. If the standard as enunciated by Regional Director Crawford is the one to be applied, a panel decision could almost never be implemented in an off/on case, and here the panel decision was in fact discarded.

An additional disturbing aspect of the Regional Board's determination of January 13, 1973, was the ground for assigning Billitari's offense behavior to the very high severity category. The stated reason for the categorization was the description of Billitari's offense behavior in the 1972 presentence report. At the December 11, 1974, examiner panel hearing, this subject was discussed, although the transcript of the discussion is fragmented. There is evidence, however, that Billitari's lawyer was successful in delimiting to some extent the nature of the offense committed.

At the Board's meeting on January 13, 1973, however, Billitari did not have representation, permission having been denied on January 8th. In addition,

Billitozi did not have the benefit of commenting on the written presentencing report or the committee panel's report concerning his placement in the offense behavior guidelines. In other words, Billitozi had no input whatsoever in the determination of this important, outcome determining question. The Regional Board, however, at an admittedly original consideration chose to resolve this question on the basis of the oblique statements contained in a presentence report prepared in 1972.

The court itself has reviewed the presentence report prepared for Judge Henderson in 1972 and concludes that the allegations regarding the offense behavior and the allegations concerning organized crime involvement are based substantially on hearsay and not infamable. The opportunity thus far afforded to Billitozi to contest the allegations, however, was deficient. On December 11, 1974, he was surprised, and on January 13, 1975, when it counted, he was precluded.

I find that these limitations on Billiteri's right to be heard were substantial, resulted in an adverse decision by the Board, and were directly attributable to the ej/oc designation. Clearly a loss of this magnitude requires some procedural protection. Catalano v. United States, 363 F. Supp. 246 (D. Conn. 1974), but no administrative procedures to review the ej/oc question are available. In addition, a considerable passage of time has occurred since these proceedings began. The Board has already had a second opportunity to propose reasons for denying parole, and Billiteri alleges hardships which he asks this court to consider in expediting his application. Under the circumstances, it seems inappropriate to remand to the Board for yet another reconsideration. See Martinez v. Richardson, 472 F.2d 1121 at 1125 (10th Cir. 1973).

It is therefore ordered that a hearing be scheduled in this matter to take place at 10:00 a.m. on April 22, 1973, in Part I of this court, for the purpose of taking testimony on the issues of the organized crime connections of the plaintiff Albert H.

Billitari and the appropriateness of the placement of his offense behavior in the very high severity category.

28 CFR Sec. 2.20 (rev'd 6/74). The Government is directed to arrange for the plaintiff's presence at the hearing and to provide a copy of the plaintiff's pre-sentencing report prepared in 1972 to the attorney for the plaintiff on or before April 12, 1975.

Finally, in light of the publicity of the record below, I direct that the Board present its case first with regard to supporting the allegations of Billitari's organized crime designation and the placement of his offense behavior in the "very high severity" category.

28 CFR Sec. 2.20 (rev'd 6/74).

So ordered.

John T. Cattani
JOHN T. CATTANI
United States District Judge

DATED: April 4, 1975

ATTESZ: A TRUE COPY

JOHN K. ADAMS, Clerk
by *Debbie M. Miller*
Deputy Clerk
Original filed 4-4-75

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~~RECORDED~~

- ¹ The procedures followed by the examiner panel and the original jurisdiction designation are drawn from the rules and regulations of the United States Board of Parole. 28 CFR Sec. 2.17 (rev'd 6/74). On December 12, 1974, Billitteri's reconsideration was in fact continued as an original jurisdiction case. (See Exhibit C annexed to the Government's answer of Jan. 16, 1975.)
- ² Exhibit B, at page 2. The question of where the offense of conspiracy fits into the offense behavior classifications was critical in the reconsideration by the Board ordered on November 28, 1974. See also the notes and charts under 28 CFR Sec. 2.29 (rev'd 6/74).
- ³ See Exhibit A, at page 4. Billitteri was not represented by the same attorneys in his criminal case in 1972, and it is not clear whether the report was made available to him at that time.

23

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff : CIV. 74-365 and
-v- : CIV. 74-58-
: (Consolidated)

UNITED STATES BOARD OF PAROLE, et al.,

Defendants :

GOVERNMENT'S MEMORANDUM
OF LAW AND FACT WHICH BEAR
ON THE HEARING OF APRIL 30, 1975

This Court has scheduled a hearing on Wednesday, April 30, 1975 to determine (1) whether Petitioner Billiteri's "high severity" rating was appropriate to the circumstances of his case and (2) whether the OC (organized crime) designation was properly applied to his case.

PROCEDURES

This hearing, a hearing in which for all practical purposes the Court has supplanted the Board, is unique. However, since the Court is, in effect, acting as the Board, then the evidentiary rules of the Board should prevail and the Board should not be held to the evidentiary rulings normal and necessary to a trial. In Morrissey v. Brewer, 92 S.Ct. 2593 (1972) at 2604 the Court, in referring to a parole revocation hearing, said,

It is a narrow inquiry, the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

It is further submitted that, as in preliminary hearings, etc., hearsay testimony and even evidence normally falling under the exclusionary rule should be admitted. In Sperling v. Fitzpatrick, 426 F.2d 1161 (2nd Cir. 1970) at 1163, 1164 the Court said,

- 2 -

The exclusionary rule is believed to be a necessary restraint on the adversarial zeal of law enforcement officials. "As it serves this function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U.Pa.L.Rev. 378, 389 (1964).

A parole revocation proceeding is not an adversial proceeding. A parolee remains, "while on parole, in the legal custody and under the control of the Attorney General." 18 U.S.C. § 4203 (1964); Anderson v. Corall, 263 U.S. 193, 196, 44 S.Ct. 43, 68 L.Ed. 247 (1923). A parole revocation proceeding is concerned not only with protecting society, but also, and most importantly, with rehabilitating and restoring to useful lives those placed in the custody of the Parole Board. To apply the exclusionary rule to parole revocation proceedings would tend to obstruct the parole system in accomplishing its remedial purposes.

There is no need for double application of the exclusionary rule, using it first as it was used here in preventing criminal prosecution of the parolee and a second time at a parole revocation hearing. The deterrent purpose of the exclusionary rule is adequately served by the exclusion of the unlawfully seized evidence in the criminal prosecution.

HIGH SEVERITY RATING

Turning now to the question of the "high severity" rating given Billiteri, it is submitted that a defendant cannot be convicted on Conspiracy only, but must be convicted of a Conspiracy to violate some other law of the United States, in this case 18 U.S.C. 891 et seq., Extortionate Credit Transactions.

In the Hobbs Act, 18 U.S.C. 1951, the classic extortion statute, we find the term extortion defined as follows:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear. . . ."

18 U.S.C. 891, the section the Plaintiff was convicted of conspiring to violate, defines an extortionate means as follows:

"An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation or property of any person."

The Court's attention is also directed to the first two footnotes at the bottom of page 20031 of the regulations which state:

1. If an offense is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offenses listed.
2. If any offense behavior can be classified under more than one category, the most serious applicable category is to be used.

Comparing the definitions and considering the footnotes instructions, it becomes apparent that the Board properly determined Plaintiff Billiteri's category as very high, extortion.

It is further submitted that the Board need not look to the crime to which the prisoner pleaded guilty, but may, in fact, look to the crime which the prisoner allegedly committed. In Lupo v. Norton, 371 F.Supp. 156 at 161 (D.Conn. 1974), the Court said,

In the context of these cases, the crucial regulation of the Board that affords protection against unfounded charges is the requirement that reasons be given for adverse parole decisions. 28 C.F.R. § 2.15 (revised). When the Board uses an alleged offense as a basis for parole decision-making, this requirement of stating reasons becomes the prisoner's sole protection against the risk that he may be unfairly penalized because of charges on which he was never convicted and which he may be able to controvert, either at the parole hearing or upon administrative appeal from an adverse decision. Unless the word "reasons" is to be drained of meaning, the Board must inform a prisoner that an alleged offense is the basis of an adverse parole decision.

The alleged offense, the substantive crime of making and collecting extortionate extension of credit, was considered by the Board in this case.

See (1) the proceeding of May 24, 1972 in the case of United States v. Billiteri, Cr. 1970-197, appended; (2) the presentence report re Billiteri of June 15, 1972 appended and the April 16, 1975 affidavit of Curtis C. Crawford, Regional Director of the Board appended.

ORGANIZED CRIME DESIGNATION

The regulations of the Board provide that in certain cases a prisoner may be designated OC or organized crime, and that this designation (an adverse one) will have a bearing upon his parole. It should be noted that while Billiteri was given such a designation it was not a consideration in the Board's denial of Billiteri's parole.

Turning now to the hearing, it is submitted that if the Board is to justify its OC designation relative to Billiteri, it must show that Billiteri was a prominent figure in a structured criminal syndicate. In Masiello v. Norton, 364 F.Supp. 1133 (D.Conn. 1973) the Court said,

The relevant section of the Board's rules reads as follows:

Organized crime. Included may be those prisoners who, in the Board's judgment, were key figures in organized criminal activities. Persons in this category are those who were professional criminals on a regular basis and who may have played a significant role in their organizations. Excluded are those who were involved only in an incidental way or who were convicted as lesser figures in a larger conspiracy or in a many faceted offense. (emphasis original). Rules of the United States Board of Parole, p. 22 (1971).

The phrase "organized crime figure" may, unless carefully defined, be misconstrued and misapplied. It may be interpreted to include, as the government's position suggests, any member of a joint venture who engages in a criminal activity involving some systematic planning and united effort. Under this definition almost every prisoner who participated in a crime with another could properly have his prison file jacket inscribed with an "o/c" label. The Court cannot conceive that this was the intent of the Board's enactment. Rather, in the Court's opinion, the clear import of the language of the regulation is that a prisoner may be classified as a member of organized crime if the officials of the Parole Board have a reasonable basis in fact to conclude that the inmate was a prominent figure in a structured criminal syndicate composed of professional criminals who primarily rely on unlawful activity as a way of life. (emphasis added.)

WHEREFORE, it is submitted that: (1) The evidentiary rules of an adversary proceeding should not prevail and that the Board should be permitted to introduce hearsay and even material normally precluded by the exclusionary rules; (2) The "high severity" rating can be established, within the Board's rules, not only by the proper application of the rules themselves, but by looking to the crime which Billiteri allegedly committed which is also a provision of the rules, and (3) That the Board must establish that, in fact, Billiteri was a prominent figure in a structured criminal syndicate.

Respectfully submitted,

DATED: April 28, 1975

RICHARD J. ARCARA
United States Attorney

AT: Buffalo, New York

BY: D. P. O'Keeffe
DENNIS P. O'KEEFE
Department of Justice Attorney

cc: Mr. John K. Adams
U.S. District Court Clerk

Philip B. Abramowitz, Esq.
76 Niagara St.
Buffalo, New York

(24)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI

: CIV. 74-365

-v-

: CIV. 74-580

UNITED STATES BOARD OF PAROLE, et al.

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

TO: THE UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF NEW YORK

and

THE WARDEN, LEWISBURG PENITENTIARY, LEWISBURG, PENNSYLVANIA.

GREETING:

YOU ARE HEREBY COMMANDED to produce the body of ALBERT M. BILLITERI, now detained in the Lewisburg Penitentiary, as it is said, before the United States District Court for the Western District of New York, sitting on the 6th floor of the United States Court House, located at Niagara Square, in the City of Buffalo, New York; on the 22nd day of April, 1975, at 10:00 a.m., and the said United States Marshal for the Western District of New York shall keep the said Witness safely in custody until the said Witness shall have appeared before the said Court, thereafter returning the said Witness to his place of confinement as otherwise required by law.

UNITED STATES DISTRICT JUDGE

DATED: April 8th, 1975

AT: Buffalo, New York

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI	:	CIV. 74-365
-v-	:	CIV. 74-580
UNITED STATES BOARD OF PAROLE, et al.	:	

PETITION FOR WRIT OF
HABEAS CORPUS AD TESTIFICANDUM

THE UNITED STATES OF AMERICA by and through Richard J. Arcara,
United States Attorney for the Western District of New York, and Dennis P.
O'Keefe, Department of Justice Attorney, hereby petitions this Court for
a Writ of Habeas Corpus Ad Testificandum for the above-named Witness.
And as grounds in support of this Application, the Government sets forth
the following facts and circumstances, to wit:

The said Witness, ALBERT M. BILLITERI, is currently confined in the Lewisburg Penitentiary, the City of Lewisburg, Pennsylvania. The Court has Ordered that the said Witness be present at a hearing to be conducted at 10:00 a.m. on April 22, 1975, at the United States Court House in Buffalo, New York.

WHEREFORE, THE UNITED STATES OF AMERICA requests that this Court issue a Writ of Habeas Corpus Ad Testificandum commanding the United States Marshal for the Western District of New York and the Warden at Lewisburg Penitentiary to produce the aforesaid Witness before the United States District Court for the Western District of New York at 10:00 a.m. on April 22, 1975.

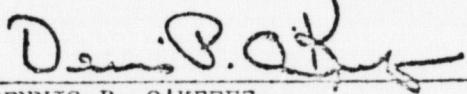
Respectfully submitted,

RICHARD J. ARCARA
UNITED STATES ATTORNEY

DATED: April 8, 1975

AT: Buffalo, New York

BY:


DENNIS P. O'KEEFE
Department of Justice Attorney

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI, :
Plaintiff : CIV. 74-365 and
: CIV. 74-58
---v--- : (Consolidated)
UNITED STATES BOARD OF PAROLE, et al., :
Defendants :

THE BOARD'S MEMORANDUM OF
LAW AND FACT RELATING TO
PETITIONER BILLITERI PAROLE DENIAL

On April 30, 1975 Petitioner Billiteri was given a hearing to determine whether or not the Board of Parole (hereinafter the Board) properly designated his case as Organized Crime (OC) and whether or not his severity rating was proper. Following the hearing the Court directed that a transcript of the hearing be prepared for all parties and directed the parties to submit to the Court legal memorandums addressed to the following issues:

- (1) The legality of the Board's having established, within its regulations, an Organized Crime (OC) category;
- (2) If the OC category was properly established, within the Board's discretion, whether or not Petitioner Billiteri was properly designated OC;
- (3) Whether or not the Board properly found Billiteri's severity rating to be "very high", and
- (4) Finally, whether the transcript of a Court Ordered wire interception should be considered by the Court in deciding the issue.

I. Legality of the Board
Establishing, Within Its Regulations,
An Organized Crime Category

Petitioner Billiteri has challenged the Board's authority to set up - within its regulations - an Organized Crime (OC) category (although

Billiteri has given no legal or factual basis for his challenge). The Board answers as follows: 18 U.S.C. 4201 legally established the Board of Parole. 18 U.S.C. 4203 gave the Board broad discretion in making determinations relative to the granting or withholding of parole. 18 U.S.C. 4208 gave the Board leave to promulgate regulations under the authority of the Attorney General. In this regard the Court should take note of Board Chairman, Maurice H. Sigler's Affidavit submitted in the case of Battle v. Norton, 365 F.Supp. 925 (D.Conn. 1973), which states as follows:

AFFIDAVIT

I, MAURICE H. SIGLER, being duly sworn, depose and state that:

I am Chairman of the United States Board of Parole with offices located at 101 Indiana Avenue, NW., Washington, D.C. This affidavit will set forth the method of operation of the paroling policy guidelines adopted by the Board and presently in use in parole decision making.

The Parole Board's guidelines indicate the approximate range of time to be served for various combinations of offense severity and offender characteristics (offender characteristics refer to risk of parole violation or recidivism). In other words, there is a balancing of offense severity against risk of violation. Risk of parole violation must be included in every use of the guidelines to determine how long an individual prisoner will be held, though it may happen in individual cases that offense severity will so outweigh favorable risk that a prisoner serving an exceptionally short sentence will not be paroled, but rather released by mandatory release under the good time law.

The guideline ranges are set for cases with good institutional performance. A hearing panel may render a decision either above or below the guideline range if it is justified by a sufficient explanation. Circumstances in which the Board may consider decisions below the guidelines include exceptionally good institutional performance; substantial medical problems; cases in which the subject has been in state custody for a long period on other charge(s); cases calling for deportation only; cases in which the sentencing judge has recommended early parole (Form 792); and cases in which the Board feels that the clinical risk prognosis is substantially better than indicated by the offender characteristics score. (The offender characteristics score is a predictive device, similar in principle to the actuarial tables used by insurance companies.)

That the guidelines have not curtailed use of discretion by the Board is shown by the fact that in the first

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four months of guideline usage in the pilot project approximately 63 percent of hearing panel recommendations were within the guidelines; 22.5 percent of panel recommendations were below the guidelines; and 14.5 percent of panel recommendations were for decisions above the guidelines.

The guidelines were designed to take into account the statutory criteria for parole consideration in the following manner:

- (a) The risk scale relates to the standard of 18 U.S.C. § 4203(a) that there must be a reasonable probability that the prisoner will live and remain at liberty without violating the law.
- (b) The consideration of institutional performance relates to the requirement of 18 U.S.C. § 4202 that the prisoner must have observed the rules of the institution in which he has been confined.
- (c) The offense severity scale relates to the standard of 18 U.S.C. § 4203(a) that, in the opinion of the Board release would not be incompatible with the welfare of society. For example, a prisoner who has committed a very serious offense, such as armed robbery, but who is a good parole risk (i.e., no prior record, good work history) would generally not be released after serving three months because, in the opinion of the Board, release at that time would depreciate the seriousness of the offense committed and thus be incompatible with the welfare of society. In fact, prisoners who have committed very high severity offenses who are also judged to have a very high probability of successful parole performance will not generally be released until they have served 26 to 36 months. However, it is important to stress that this is not an absolute minimum; earlier paroles may be granted where there are sufficient reasons such as those described above. Thus, the range of the guidelines is not directly comparable to judicially set minimum sentences, which may not be reduced by Board discretion. The guidelines are simply a statement by the Board of the manner in which it generally intends to exercise its discretion.

A parole system which did not take into account the severity of the offense would generally result in immediate parole grants for the most serious offenses while giving almost no chance of parole at any time for many minor offenders, since offenders who commit the most serious offenses (homicide, assault, rape) often tend to be among the best parole risks, while offenders committing certain less serious offenses (joyriding, check forgery) often tend to be among the poorest risks. Such a policy would certainly, in the opinion of the Board, be incompatible with the welfare of society.

In summary, the guideline concept attempts to

generate an explicit paroling policy to lead to more equitable and consistent decisions by structuring discretion within the broad statutory mandate of the Board without removing consideration of each individual case on its merits.

/s/ Maurice H. Sigler
Maurice H. Sigler
Chairman
U.S. Board of Parole

The Court may also wish to review the findings in the Battle case relative to the broad discretion granted the Board.

In this case the Board submits that it was properly created by Act of Congress under 18 U.S.C. 4201, that it properly exercises its discretion granted under 18 U.S.C. 4203, and that - in exercising its discretion - it has properly established an OC category, by regulation, under the authority of the Attorney General as provided by 18 U.S.C. 4208. In setting up an Organized Crime category the Attorney General took notice, as he had to take notice of President Johnson's speech of May 1966 and of Congressional findings of 1970.

In May of 1966, President Johnson designated the Attorney General as the focal point in the federal government for the drive against organized crime. Addressing himself to the problem, the President said in part, ". . . I know how deeply all of you share my concern over the scope and power of organized crime in America. It constitutes nothing less than a guerilla war against society.

"This is a war that takes scores of lives each year in gangland violence.

"It is a war that terrorizes thousands of citizens. It is a war in which billions of dollars are drained off by illegal gambling, narcotics, prostitution, loan-sharking, arson and other form of racketeering.

"Most damaging of all are the efforts of racketeers to seek protection against honest law enforcement by corrupting public officials. Such evil strikes at the heart of democracy. It corrupts individual officials. It breeds a general contempt of law. It saps public respect for law enforcement. . . ."

The President's speech was based upon the findings of the President's Commission on Law Enforcement and Justice.

The Congressional findings referred to above appear on page 1073
of the United States Code Congressional and Administrative News of 1970:

ORGANIZED CRIME CONTROL ACT OF 1970

For Legislative History of Act, see p. 4007

PUBLIC LAW 91-452; 84 STAT. 922

[S. 30]

An Act relating to the control of organized crime in the United States.
Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled, That:

This Act may be cited as the "Organized Crime Control Act of 1970."

STATEMENT OF FINDINGS AND PURPOSE

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

It should also be noted by the Court that in Billiteri case the Assistant Attorney General, Criminal Division, by memorandum of March 15, 1974 (included in the Board's memo of April 28, 1975) recommended to the Board that Billiteri be given an Organized Crime designation.

In deciding this issue the Court may wish to refer to comments in United States v. Carter, 493 F.2d 704 (2nd Cir. 1974) and United States v. Singleton, 460 F.2d 1148 (2nd Cir. 1972). 166

WHEREFORE, the Government submits that the Organized Crime category was properly established by regulations.

II.

The Property of Billiteri
Having Been Given an OC Designation

Before directly addressing this issue, the Board would like to remind the Court that by Affidavit of January 15, 1975 (attachment B to Board's memorandum of January 16, 1975), the Board advised the Court as follows being at paragraph three (3):

"On January 13, 1975, the Board's Regional Directors met for the first time since October 1974. At that time it was agreed that Mr. Billiteri's case would first be considered without reference to the allegations of organized crime association in records".

The Affidavit goes on to say that the Board never reached the issue of Organized Crime, but, on the contrary, decided to deny Billiteri's parole for other but sufficient reasons.

The question of the propriety of Billiteri's OC designation falls naturally into two parts: (1) Whether or not there was sufficient information before the Board to make such a determination, and (2) whether the Board's evidence at the April 30, 1975 hearing before the Court established that Billiteri was, in fact, "a prominent figure in a structured criminal syndicate."

Turning them to the first part of the question we now know (by virtue of the Affidavit of Curtis C. Crawford of April 16, 1975 with attachments thereto) that the Board, meeting in Kansas City on January 13, 1975 had before it the following:

Sentence computation record (Bureau of Prisons Form BP-5, Rev. 8-71).

Pre-sentence Report, Western District of New York, dated June 15, 1972.

Institutional Classification Summary.

United States District Judge John T. Curtin's Decision and Order dated November 26, 1974.

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Henry E. Petersen, Assistant Attorney General,
Criminal Division Memorandum to Maurice H. Sigler,
Chairman, U. S. Board of Parole, dated March 15, 1974.
Certified copy, Exhibit 3 attached (Confidential).

Examiner Panel Hearing Summary, dated December 11, 1974.

We also know what transpired at the original hearing because we have a retyped transcript of the hearing which the Board has provided to all parties.

Let us now examine the facts and allegations which were before the Board on January 13, 1975.

The presentence report prepared by William Powell, Probation Officer, dated June 15, 1972 shows that Petitioner, Billiteri, was given an opportunity to give his version of the offense but declined to do so. While his attorney said at that time that a written version of Billiteri explanation of the offense would be forwarded to the Court, no such statement was ever submitted.

Billiteri's arrest record, as contained in the presentence report disclosed the following:

- (1) That Billiteri was involved in the theft and stripping of an auto in 1942,
- (2) That he violated his probation in 1944,
- (3) That he was a suspect of a murder in 1944,
- (4) That he was convicted of violating the federal liquor laws in 1944,
- (5) That he was accused of an extortion in 1945 wherein he made threats of bodily harm to the female proprietress of a beauty shop in Buffalo,
- (6) That he was charged with the possession of burglary tools in 1948,
- (7) That he was suspected of auto theft in Kansas City in 1949,
- (8) That he was convicted of auto theft in a Federal Court in 1950,
- (9) That he was accused of illegal gambling in 1966,
- (10) That he was acquitted on charges of bank robbery in 1970,
- (11) That he pleaded guilty to conspiracy to violate the federal Extortionate Credit Act in 1972,
- (12) That he pleaded guilty in County Court in 1972 to the charge of criminal possession of stolen property, and
- (13) That charges of the criminal extortion of Gregory Parness were dropped in 1972.

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that the inmate was a prominent figure in a structured criminal syndicate composed of professional criminals who primarily rely on unlawful activity as a way of life.
(emphasis added.)

The presentence report also discloses that Thomas Cleary, who was at that time Chief of the District Attorney's Organized Crime Control Group, and who was a seasoned and knowledgeable investigator and prosecutor, advised the federal Probation Office that Petitioner Billiteri was an "enforcer" for the local mob.

The presentence report also contains the Government's uncontested statement of the facts surrounding the charge to which Billiteri pleaded, namely, conspiracy to violate the Extortionate Credit Act. That statement of facts shows that two men were beaten for the failure to repay extortionate extension of credit.

Now let us turn to the Hearing Summary of December 11, 1974 which was also before the Board. That summary shows the following:

- (1) That Petitioner Billiteri was given a hearing on December 11, 1974 wherein he was represented by Counsel,
- (2) That Billiteri was given an opportunity to give his version of the offense and that he deliberately lied to the Board by denying the beating of the two extortionate credit victims,
- (3) That Billiteri is known to be a prominent member of a structured criminal syndicate in Buffalo, and
- (4) That Billiteri was given an opportunity to rebut the allegation, but declined to do so.

The Board also had before it the recommendation of Henry E. Petersen, the Assistant Attorney General of the United States Department of Justice, dated March 14, 1974, to the effect that Billiteri was a prominent member of a structured criminal syndicate in Buffalo and that he should be denied parole.

With regard to the Board's decision to deny Billiteri's parole, and assuming, as this Court has assumed, that the question of Billiteri's Organized Crime designation was before the Board, what basis did the Board have for denying Billiteri's parole? The Board had before it the lengthy criminal record of Billiteri which contains at least three accusations of extortion, the proprietress of the Beauty Shop, Gregory Parness, and the charges to which he

pledged guilty in this case. The Board has before it Billiteri's failure to explain the circumstances of this case originally and his lies before the panel later. They had before it his failure to even deny his organized crime connections, and they had before it the statements of Thomas Cleary and Henry E. Petersen that, in fact, Billiteri was a prominent member and "enforcer" for a structured criminal syndicate.

It is submitted that, whether or not the Board considered Billiteri's organized crime designation, they had every right, within their broad discretion, to deny Billiteri's application for parole.

Turning now to the other side of the coin, we have the second part of this two-pronged question, if the Board, with all of the information that it had before it as set forth above, improperly denied Billiteri's parole, did the Board, at the hearing conducted in this Court on April 30, 1975, sustain its burden of proving that, in fact, Billiteri, by his conduct and pattern of criminal activity, earned the organized crime designation assigned to him.

Now this Court had before it all of the information which was before the Board as set forth in the first part of this argument. In addition, the Board presented witnesses and documentary evidence as follows:

GREGORY PARNESS testified that he and others had performed a series of burglaries in 1967 and 1968. On one occasion, they burglarized the home of Buffalo millionaire, Seymour Knox, and among the objects taken were a number of items of Gold, some of which bore the Knox name, and other pieces were initialled. Parness, Frankie D'Angelo (recently murdered) and Stanley Seneca sold the Gold to Billiteri for \$1,500.00. Billiteri paid them \$900.00, but never paid the balance. Parness testified that on other occasions he tried to sell stolen property to Billiteri, but Billiteri did not want to pay the asking price. In this regard, he mentioned a jewelry store on Delaware Avenue which Billiteri refused to buy the proceeds of the robbery. He had diamond rings made for Billiteri and Lagattuta. Parness testified that, on another occasion, he and others stole some \$200,000.00 worth of furs from Gross Furrier and that they took these furs to New York to

sell them. When Billiteri found this out he sent for them and when they arrived, he and Sam Lagattuta beat them severely for not offering the furs to Billiteri first. He then demanded that they each pay him \$1,000 tribute which they subsequently did. Parness then testified that in 1968 he borrowed \$200.00 from Billiteri at 6 for 5 with the understanding that if he did not repay the money on time he would suffer bodily harm. Parness then testified that in 1969 Billiteri conspired with him and others to burglarize a local bank; however, their attempts to open the safe with Billiteri's special saw were unsuccessful. Mr. Parness' testimony that he was beaten by Mr. Billiteri because he had taken the furs to New York instead of offering them to Billiteri, his testimony of paying \$1,000.00 in tribute money to Billiteri, and his testimony as to Mr. Billiteri's reputation all establish that, in fact, Billiteri is a member, and a prominent one, of a structured criminal syndicate in Buffalo. We should also keep in mind the diamond rings given to Billiteri and Lagattuta as tribute.

JOSEPH ZITO testified that he knew Billiteri from roughly 1965 to 1970. Zito testified that on one occasion he (Zito) came to Buffalo in an attempt to collect an extortionate extension of credit. The victim told Zito to return in the afternoon and he would pay him the \$1800.00. When Zito returned the victim took him in the back of the store where he met Billiteri. Billiteri told Zito that he, Zito, had no business collecting in his, Billiteri's, territory. The matter was finally resolved when Joe Fino intervened and it was decided that Billiteri would collect for Zito, but it was also made clear that, in the future, Zito was not to make collections in Buffalo. Zito further testified that he, Zito, was a member of a structured criminal syndicate assigned to work out of New York City. On one occasion Freddie Randaccio (now serving 20 years for bank robbery) told Zito that "Billiteri is with me" which Zito acknowledged was tantamount to telling him that Billiteri was a member of a structured criminal syndicate.

Once again, the testimony as to Billiteri's territory and threats

to Zito, taken together with Randaccio's reference to Billiteri, clearly proves that Billiteri was, in fact, a prominent member of this structured criminal syndicate, and that he was in charge of collecting extortionate extensions of credit in Buffalo. We should also keep in mind Randaccio's comment to Zito to the effect that Zito could lay off action in the Billiteri's gambling set-up if he wanted to.

RUSSELL DeCICCO testified that he knew Billiteri roughly from 1960 to 1971. He testified that in 1971, when both he and Freddie Randaccio were in Leavenworth prison together, Randaccio agreed to sponsor DeCicco's membership in Buffalo's structured criminal syndicate. He was instructed to see Randaccio's brother Victor, which he did. Victor took him to Joe Fino and Joe Fino assigned him to work for Billiteri in loansharking and gambling. While admittedly he did little or nothing for Billiteri, he was given \$100.00 per week by Billiteri until he again returned to prison on another charge. He testified that he was in Billiteri's gambling establishment on Fargo Street on several occasions where he witnessed Al Caci and John Paliteri running the operation for "Babe". Billiteri told DeCicco that he grossed eight or nine thousand per week from illegal gambling.

DeCicco then testified that on one occasion he went with Billiteri to Chubby Gallo's place of business on Hertel Avenue to collect \$5,000.00. While no explicit threats were made, Billiteri told Gallo that he was in arrears on his loan and that he would have to pay up. Billiteri later told DeCicco that Gallo had paid him some money.

DeCicco testified that Billiteri called him about the Sidney Gross Furrier robbery and that he and Billiteri met in the basement of Billiteri's brother's home. Billiteri told him he knew he was involved in fencing the furs in New York. DeCicco offered Billiteri one-half of the furs to be sold by Billiteri with the proceeds to be split evenly. DeCicco termed this meeting a "shakedown". See transcript of the hearing, pages 65, 66, 67, 68 and 82.

DeCicco testified as to another occasion when he gave Billiteri a \$1,000 stolen diamond ring by way of tribute and explained that he had given Sam Pieri \$5,000 of the \$50,000 -- proceeds from the sale of eight million in stolen bonds -- by way of tribute as was customary within the structured criminal syndicate.

DeCicco testified as to conversations he had with Sam Lagattuta, Gregory Parness, Frank D'Angelo and Stanley Seneca, all of which confirmed that Billiteri was also in the business of shaking down burglars, extorting them through fear. He testified that Lagattuta also told him that they shook down burglar Jimmy Brocato. On page 83 of the transcript, in answering the Court's question as to why these men let themselves be beaten, DeCicco said,

"Yes, I can, because if they did not give up parts of the proceeds from the burglaries, they would be constantly beaten."

Finally, DeCicco testified that in the 1960's Matthew Billiteri told DeCicco that "Babe" Billiteri was a "made guy" which DeCicci interpreted as meaning that Billiteri was a prominent member of a structured criminal syndicate.

Once again, we place Billiteri in loansharking and gambling. We also find him shaking down burglars through fear and violence. We find him shaking down DeCicco on the Sidney Gross fur robbery. We find Billiteri collecting extortionate extensions of credit and we find DeCicco giving a \$1,000 diamond ring as tribute.

Following the testimony of its witnesses, the Board then offered in evidence the following:

- (1) A transcript of the proceedings of May 24, 1972 which was the plea of Mr. Billiteri. This transcript clearly shows that Mr. Billiteri did in no way refute the Government's statement of facts as given openly to the Court.
- (2) A copy of Mr. Billiteri's presentence report discussed earlier in this memorandum.

- (3) A copy of the April 16, 1975 Affidavit of Curtis Crawford detailing the procedures of the Parole Board and the evidence which it had before it.
- (4) A copy of the retyped transcript which clearly demonstrates what occurred at Billiteri's parole hearing on December 11, 1975.
- (5) An Affidavit of April 30, 1975 by Richard Schaller of the Federal Bureau of Investigation in which Schaller, referring to seven unnamed informants, details Billiteri's criminal background and prominent position in a Buffalo structured criminal syndicate.
- (6) The Grand Jury testimony of Bernard Spaziani, Donald Tonhaus and Joseph LaPorta, which supports the Board's claim that two men were beaten in an attempt to collect extortionate extension of credit.

All of the above documents we admitted in evidence. In addition, the Board offered the transcript of a Court Ordered wire interception which, if admitted in evidence, would corroborate the witnesses' testimony that Billiteri was, in fact, conducting an illegal gambling business. The appropriateness of its admission will be dealt with later in this memorandum.

Now, with all of the above in mind, what did the Board establish at the hearing of April 30, 1975? The Board established, beyond any reasonable doubt, that Albert M. "Babe" Billiteri, a hardened, seasoned criminal, is a prominent member of a structured criminal syndicate, that his territory is Buffalo, that his business is extortion, gambling and fencing stolen goods.

It is, therefore, submitted that Mr. Billiteri, who did not take the stand at the hearing - nor did he present any witnesses - has had every possible opportunity to refute the Board's OC designation and that he has failed to do so. Conversely, it is submitted that the Board has carried its burden of establishing, through direct testimony and documentation, that Mr. Billiteri is a professional loanshark with a given territory, that no one

else is allowed to operate in his territory, that he operates an illegal gambling business, that he shakes down burglars, that he demands tribute from other criminals, all because of his prominent position in the Buffalo structured criminal syndicate.

III.

Propriety of the Very High
Severity Rating Given
Billiteri by the Board

Turning now to the question of the "high severity" rating given Billiteri, it is submitted that a defendant cannot be convicted on Conspiracy only, but must be convicted of a Conspiracy to violate some other law of the United States, in this case 18 U.S.C. 891 et seq., Extortionate Credit Transactions.

In the Hobbs Act, 18 U.S.C. 1951, the classic extortion statute, we find the term extortion defined as follows:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear. . . ."

18 U.S.C. 891, the section the Plaintiff was convicted of conspiring to violate, defines an extortionate means as follows:

"An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation or property of any person."

The Court's attention is also directed to the first two footnotes at the bottom of page 20031 of the regulations which state:

1. If an offense is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offenses listed.
2. If any offense behavior can be classified under more than one category, the most serious applicable category is to be used.

In summary, the guideline concept attempts to

Comparing the definitions and considering the footnotes instructions, it becomes apparent that the Board reasonably and properly determined Plaintiff Billiteri's category as very high, extortion.

It is further submitted that the Board need not look to the crime to which the prisoner pleaded guilty, but may, in fact, look to the crime which the prisoner allegedly committed. In Lupo v. Norton, 371 F.Supp. 156 at 161 (D.Conn. 1974), the Court, who examined this doctrine at length, beginning at page 159, said,

[3] Petitioners' first complaint attacks not simply use of the alleged offense to locate them on the guideline table, but really questions whether the Board may give any consideration to allegations of criminal conduct that have not resulted in conviction. The same issue has been a source of continuing concern in the context of sentencing. It is generally agreed that a sentencing judge may consider a wide range of information, including "information bearing no relation whatever to the crime with which the defendant is charged." Gregg v. United States, 394 U.S. 489, 492, 89 S.Ct. 1134, 1136, 22 L.Ed.2d 442 (1969); Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Sentences have been validly imposed based on evidence of other offenses not stated to be related to the convicted offense, United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir. 1968); on evidence introduced on counts that resulted in an acquittal, United States v. Sweig, 454 F.2d 181 (2d Cir. 1972); and, without presentation of evidence, on allegations in related counts that were dismissed, United States v. Doyle, 348 F.2d 715 (2d Cir. 1965); see, generally, United States v. Weston, 448 F.2d 626, 633 (9th Cir. 1971) and cases there cited.

Despite the frequency with which this rule is announced, its risk of penalizing a defendant for alleged offenses of which he is in fact innocent has prompted many courts to develop procedural protections to lessen this risk. Thus, courts have ruled that, at sentencing, allegations of misconduct must be made known to a defendant, United States v. Picard, 464 F.2d 215 (1st Cir. 1972); that disputed allegations must be tested at a hearing, United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970); United States ex rel. Brown v. Rundle, 417 F.2d 282 (3d Cir. 1969); and that alleged misconduct cannot be relied upon unless supported by "persuasive" information. United States v. Weston, supra, 448 F.2d at 634.

These decisions stem, in varying degrees, from Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948), in which the Supreme Court set aside a sentence of an unrepresented defendant whose sentence was based on false information about prior convictions. While the Second Circuit earlier viewed

Townsend as a case concerned primarily with lack of counsel, see United States v. Doyle, *supra*, 348 F.2d at 722, it has more recently drawn from it this more sweeping rule: "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." United States v. Malcolm, *supra*, 432 F.2d at 816. See United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) (approving the vacation of a sentence based on "misinformation of constitutional magnitude").

[4] The parole decision has traditionally been subjected to less scrutiny (both judicial and academic) than the sentencing decision both because parole has been considered a matter of grace and because the parole decision is made within the limits set by the sentence, whereas the sentencing decision is made within the usually broader limits of a statutory penalty. The validity of both arguments is subject to question. In any event, the use of alleged misconduct in parole decision-making is, from one standpoint, more disquieting than in sentence proceedings. Courts' traditional reluctance to impose procedural due process protections upon parole proceedings leaves prisoners exposed to the risk that untrue charges will jeopardize their chances for parole, and that risk is not subject to minimizing procedures such as those adopted in Malcolm, Picard, and Weston. The problem appears to have three unsatisfactory solutions: (a) prevent the Board from considering unproved or at least unsubstantiated charges of misconduct, a course that might improperly curtail the Board's broad discretion to consider all relevant factors, 28 C.F.R. § 2.14 (revised); *Scarpa v. U.S. Board of Parole*, 477 F.2d 278 (5th Cir. 1973); (b) impose procedural due process protections that require disclosure to the prisoner of misconduct allegations and some minimal opportunity for him to challenge the allegations, a justifiable course, but one which lower courts in this Circuit cannot require in light of current rulings concerning constitutional rights in parole hearings, see *Menchino v. Oswald*, *supra*; or (c) leave the prisoner to the risk that parole may be denied because of an allegation that is untrue, unchallenged, and even unknown to the inmate.

[5, 6] The Board's own newly-adopted regulations offer a hopeful solution to this trilemma. By making its table of guidelines known to prisoners and by requiring reasons for denial of parole, the Board has adopted procedures well designed to reduce the risks that parole will be denied based on totally unfounded charges. Because the Board's own procedures serve such a vital function, it is especially important that the procedures be carried out with faithful adherence to the Board's regulations. The normal rule that agencies must observe their own regulations has added significance in this case because of the important safeguard these regulations can supply.

[7] In the context of these cases, the crucial regulation of the Board that affords protection against unfounded charges is the requirement that reasons be given for adverse parole decisions.

28 C.F.R. § 2.15 (revised). When the Board uses an alleged offense as a basis for parole decision-making, this requirement of stating reasons becomes the prisoner's sole protection against the risk that he may be unfairly penalized because of charges on which he was never convicted and which he may be able to controvert, either at the parole hearing or upon administrative appeal from an adverse decision. Unless the word "reasons" is to be drained of meaning, the Board must inform a prisoner that an alleged offense is the basis of an adverse parole decision.

In these cases it is inferable from the record and the Government acknowledges that petitioners' alleged offense was considered by the Board, apparently to increase the offense severity rating. This led the Board to select as the appropriate guideline an incarceration period of significantly greater length than their convicted offense warranted. They were therefore denied parole and given setoffs until a point still short of the guideline range for their alleged offense. In doing so, the Board did not disclose to petitioners at any time that their alleged offense was in fact the reason for their parole denial.

Petitioners were told only that their release would depreciate the seriousness of "the offense committed". *Battle v. Norton*, *supra*, permitted the Board to give this reason as a short-hand way of saying that a prisoner had not yet been incarcerated for the period of time indicated by the guideline table, i.e., the suggested time for his convicted offense and his offender characteristics. But in petitioners' cases this same reason is totally uninformative because it fails to alert them to the fact that their alleged offense was the reason for parole denial. Worse yet, it is misleading because it is the same reason the Board uses when it denies parole to those, like Battle, who are rated according to their convicted offense.

Lupo alleges in his papers that he has at all times maintained his innocence of the armed robbery charges. (Lupo reply brief, p.2). Thus, the Board's failure to identify his alleged offense as the reason for parole denial not only breached its regulation requiring reasons, it also significantly prejudiced petitioners because it deprived them of the opportunity to challenge serious allegations that they wish to contest.

[8] The Board's regulations specify that "aggravating circumstances", such as might be involved in a prisoner's alleged offense, can be considered in parole decision-making. Consideration of an alleged offense violates no presently cognizable constitutional right of these petitioners, 28 C.F.R. § 2.52(c) provides that "especially

mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed." Thus, the regulations specify two distinct ways that an alleged offense can be considered. First, the Board can locate a prisoner on the guideline table by using his alleged offense. Second, the Board can apply the guideline table according to the prisoner's convicted offense and then, even though he has been incarcerated for the time indicated by the guideline, deny parole because of the aggravating circumstances of the alleged offense.

[9] However, under either approach, the Board's regulation requiring a statement of reasons can be satisfied only if the prisoner is told that his alleged offense was the basis for parole denial and how that alleged offense was used. Thus, the Board must tell the prisoner either that it selected an offense severity category because of his alleged offense, or that it considered his alleged offense to be an aggravating circumstance that justified incarceration beyond the guideline period indicated for his convicted offense.

[10] The regulation requiring a statement of reasons does not specify when reasons are to be given, though the normal expectation would of course be after a decision has been reached. However, when an alleged offense may be considered by the examiners, either to select an appropriate offense category or to continue confinement beyond a guideline period, it would be helpful to alert the prisoner to this prospect during the parole hearing in order to maximize his opportunity to challenge the allegations. The entire thrust of the Board's commendable new approach is to have objective facts such as a prisoner's offense and his offender characteristics play a prominent part in parole decision-making. Toward this end, the Board makes known to prisoners both the guideline table and the rating system used to score offender characteristics. See *Grasso v. Norton*, *supra*, 371 F.Supp. at 173 n. 1. Obviously this is done so that a prisoner entering the hearing will be able to determine whether he has then served the time indicated by the guideline table or, if not, how much more time is indicated. But a prisoner's ability to know how he stands with respect to the guideline table depends on his knowing whether the Board is rating his offense severity by his convicted offense or some other alleged offense. And, unless told to the contrary, he would certainly assume, especially from footnote 1 of the table, that his convicted offense will be the basis for his rating. Whether or not the prisoner is confronted with his alleged offense during the hearing, explicit reference to his alleged offense as a reason for parole denial by the Board (indicating whether it was used to select a guideline or to continue confinement beyond the appropriate guideline) will still afford the prisoner an opportunity to challenge the allegations in his administrative appeals.

In this case, in denying Billiteri parole, the Board's Very High Severity Notice of Action of January 15, 1975 specifically advised Billiteri as follows:

"Your offense behavior is rated very high because it involved extortion which is in the very high severity of the Board's guidelines."

The facts that the Board considered the alleged offense is made perfectly clear in Curtis C. Crawford's affidavit of April 16, 1975.

NOW, the Board submits that it had before it on January 13, 1975 sufficient evidence to determine Billiteri's severity category as very high. However, if the Court is not satisfied that that was so, the Court may now consider the following additional evidence which the Board presented at the hearing of April 30, 1975 before this Court.

The Board submits:

- (1) That the statement of facts given by the Government at the time of Billiteri's plea supports the alleged offense.
- (2) Billiteri's failure to deny any part of the Government's statement of facts at the time of his plea supports the alleged offense.
- (3) The Government's statement of facts in the presentence report supports the alleged offense.
- (4) Billiteri's failure to give his version of the offense to the parole officer and his failure to later submit in writing his version of the alleged offense supports the alleged offense.
- (5) Billiteri's extensive criminal record, as it appears in his presentence report, supports the alleged offense.
- (6) The Grand Jury testimony of Bernard Spaziani, Donald Tonhaus and Joseph LaPorta supports the alleged offense.

(7) The allegations of informants in FBI Agent Richard Schaller's Affidavit of April 30, 1975 supports the alleged offense.

(8) The testimony of Gregory Parness to the effect that he got an extortionate extension of credit from Billiteri with the understanding that if he failed to repay it on time that he would be faced with bodily harm, supports the alleged offense. His further testimony that he, Frankie D'Angelo and Stanley Seneca were beaten for failure to fence the stolen furs with Billiteri and that they were each forced to pay \$1,000 in tribute money supports the alleged offense.

(9) The testimony of Joseph Zito to the effect that he was threatened by Billiteri and told to stay out of Billiteri's loansharking operation in Buffalo supports the alleged offense.

(10) The testimony of Russell DeCicco to the effect that he was shaken down by Billiteri on the Gross fur robbery supports the alleged offense. His testimony that Lagattuta told him that Lagattuta and Billiteri were extorting burglars through the use of violence and fear supports the alleged offense. His testimony that he went with Billiteri to collect an extortionate extension of credit for Chubby Gallo supports the alleged offense, and

(11) Finally, Billiteri's failure to take the stand or to present witnesses at a hearing specifically held so that he could have an opportunity to contest his OC rating and his very high severity rating supports the alleged offense.

The Board, therefore, submits that there is now absolutely no doubt that Billiteri is in the business of extortion and that as a professional extortionist, he has been reasonably and properly given the very high severity rating which his crime supports.

The Question of the Admissibility
of the Transcript of a
Court Ordered Wire Interception

18 U.S.C. 2515 is controlling in this case. 18 U.S.C. 2515 provides:

§ 2515. Prohibition of use as evidence of intercepted
wire or oral communications

Whenever any wire or oral communication has been
intercepted, no part of the contents of such communica-
tion and no evidence derived therefrom may be
received in evidence in any trial, hearing, or other
proceeding in or before any court, grand jury, depart-
ment, officer, agency, regulatory body, legislative
committee, or other authority of the United States,
a State, or a political subdivision thereof if the
disclosure of that information would be in violation
of this chapter.

The wiretap orders in this case were signed by Judge Henderson on
April 29, 1969; June 11, 1969 and July 11, 1969. As the Court knows from the
testimony of Sol Lindenbaum before the Court in the case of United States v.
Todaro, CR. NO. 1973-96, these orders would have been signed during a period
when John Mitchell may or may not have authorized the interceptions.

of Billiteri which contains at least three accusations of extortion, the proprietress of the Beauty Shop, Gregory Parness, and the charges to which he

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IV.

The Question of the Admissibility
of the Transcript of a
Court Ordered Wire Interception

18 U.S.C. 2515 is controlling in this case. 18 U.S.C. 2515 provides:

§ 2515. Prohibition of use as evidence of intercepted
wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The wiretap orders in this case were signed by Judge Henderson on April 29, 1969; June 11, 1969 and July 11, 1969. As the Court knows from the testimony of Sol Lindenbaum before the Court in the case of United States v. Todaro, CR. NO. 1973-96, these orders would have been signed during a period when John Mitchell may or may not have authorized the interceptions.

A verbal request to Steven Schroeder of the Special Operations Unit of the Organized Crime Section indicates that John Mitchell personally approved all of the requests in this case. I have requested that an affidavit to this effect be forwarded as soon as possible.

WHEREFORE, the transcript of the Court Ordered wire intercepts should be admitted in evidence.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney

DATED: May 19, 1975
AT: Buffalo, New York

BY: Dennis P. O'Keefe
DENNIS P. O'KEEFE
Department of Justice Attorney

Parness testified that, on another occasion, he and others stole some \$250,000.00

worth of furs from Gross Furrier and that they took these furs to New York to

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff,

-v-

UNITED STATES BOARD OF PAROLE and
MEMBERS OF THE UNITED STATES BOARD
OF PAROLE, Individually and in Their
Official Capacity and
UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION
NO. 1974-365

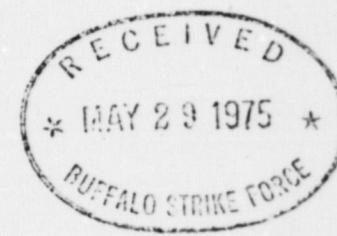
ALBERT M. BILLITERI,

Petitioner,

-v-

UNITED STATES BOARD OF PAROLE,

Respondent.



CIVIL ACTION
NO. 1974-580

THIS COURT SHOULD ORDER THE BOARD OF PAROLE TO
RELEASE ALBERT BILLITERI FROM FEDERAL CUSTODY.

At the conclusion of the hearing in this matter on April 30, 1975, this Court requested that the parties brief three issues. First, is the Plaintiff lawfully held in prison longer than he would otherwise be, by reason of the "high severity" label attached to his "offense behavior". Secondly, which standard, if any, should be applied to determine whether to classify Plaintiff as "organized crime" and did the Government's proof meet that standard. Thirdly, should the Court, and may the Parole Board, consider the Grand Jury testimony and other evidence derived from wiretapping in this case.

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I.

The question of the "high severity" classification and the "organized crime" designation must both be viewed in light of the plea bargain under which the Plaintiff plead guilty to one count of conspiracy, 18 U.S.C. §371. The transcripts and other documents introduced at the hearing or incorporated into this record and the statements of Mr. Boreanaz at the hearing, clearly indicate that the agreement was reached after hard, lengthy and good faith bargaining in which both the Government and the Plaintiff gave full consideration. The Plaintiff entered his plea, ~~carefully~~ conceding only one overt act of the conspiracy charge, a five year felony, thereby relieving the Government of its burden of proving the charges at a trial. In return, the Government moved to dismiss the remainder of the indictment, which included several twenty year felonies. Judge Henderson ratified this contractual agreement by accepting the plea, and imposed the maximum sentence on the Plaintiff under the conspiracy charge.

This bargain must be viewed in light of recent announcements of the Supreme Court on such plea bargains. In Santobello v. New York, 404 U.S. 257, (1971), the Court stated:

...The adjudication element inherent in accepting a plea of guilty must be attended by safeguards to insure the Defendant what is reasonably due in these circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. 404 U.S. 257, (1971).

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It is Plaintiff's position that for the Government to classify Plaintiff in its high severity category is to rewrite the bargain. The Government had the opportunity to seek to convict Plaintiff of such an 891 violation, but it chose to forego that option. In this sense, this case is different from the case of the Defendant who had been convicted after trial. In those cases, the Government, having bargained away nothing, arguably has the broader discretion urged here by the Government limited only by the Parole Board's authorizing statute, its own regulations, and Constitutional standards. But here, the "plea rests...on a promise or agreement by the prosecutor, so that it can be said to be part of the inducement or consideration." The promise must therefore be fulfilled.

(It is, of course, beyond Cavil that the Parole Board is bound by the agreement of the prosecutor. "A promise made by one [Assistant United States] Attorney must be attributed, for these purposes, to the Government." United States v. Giglio, 405 U.S. 150, 154 (1972).)

The Government seeks to avoid the force of the above argument by asserting that a conviction under §371 is for "conspiracy to violate some other law...in this case §891." (Government's memorandum of April 28, 1975, page 2.) That argument misses the point. Certainly there is no conspiracy "in the air", but always to commit some other crime. But it is hornbook law that the conspiracy and the substantive crime to be committed are separate evils for which legislatures may and have provided separate punishments. Here, the Government succeeded only in bargaining for a plea from the Plaintiff of the separate charge of conspiracy.

Because it has bargained away its option to seek to treat Plaintiff as a §891 violator, the Government may not now seek to hold

him as though he were one. Without even reaching the question of what proof is required for a "high severity" categorization, it is simply not open to the Government to treat him as a "high severity" violator, when it has agreed to treat him as §371 violator, i.e., as one whose offense behavior is within the range of five year felonies, the "moderate" category or at most the "high" category. Since the Parole Board has assigned the Plaintiff a "salient factor score" or 8, under the guidelines Plaintiff should be held a maximum of twenty-six months, and should long since have been released.

Further, the Parole Board's action is particularly unfair (and clearly not bargained for in any sense) in light of the promulgation of these guidelines, on which the Parole Board now relies, long after Plaintiff's agreed plea in 1972.

Plaintiff does not here challenge the propriety of the issuance of guidelines, so long as they are used as guidelines and not as an excuse to violate Plaintiff's bargained for rights nor as a cover for unauthorized and unlawful exercise of discretion.

Even if it is open to the Board to apply the guidelines to Plaintiff here, still the Government must show, with some cogent evidence, that Plaintiff has committed such high severity offenses so as to justify his classification in the high severity category.

Plaintiff will not here review in detail the evidence submitted by the Government on this question. It is sufficient to note the great disparity between the broad generalities of the Board's findings and the Government's arguments on the one hand, and the insubstantiality of the evidence presented by the Government, on the other hand. The evidence,

as it stands, is rife with contradictions and comes primarily from the mouths of witnesses fully dependent on the Government, and who have been disbelieved by juries with considerable regularity in trials before this Court.

II.

Plaintiff submits further that the organized crime label affixed to Plaintiff may not be used to hold him longer in prison, because the Government has agreed to treat his as a §371 violator and no more. The plea bargain, it is submitted, forecloses the Government from treating Defendant as anything other than a §371 violator.

The Government argues that the regulations defining the organized crime label are a proper exercise of the Parole Board's rule-making power and that the discretion to utilize such a label with the consequences thereof is within the Parole Board's statutory discretion, citing the findings of Congress and Public Law 91-452 and a Presidential speech.

Even if the Government retains such discretion despite its plea bargain, this argument must be carefully examined in light of its actual effect on imprisoned Defendants. A Defendant labeled "organized crime" who is convicted of exactly the same crime as another Defendant, is subject to greater procedural obstacles to his parole and, as a practical matter, to a longer sentence solely because of this label. This result is clearly in contradiction with the stated policies of the Parole Board to assure similar treatment for similar offenses, and to deal fairly with prisoners. Plaintiff submits that this extraordinary result, which clearly

raises serious problems of equal protection and due process, should not be held to have been authorized by Congress without much clearer statutory direction than the Government has been able to cite. Although Congress has shown concern with the organized crime problems, and indeed in Public Law 91-452 provided new weapons for the prosecution and created new crimes, it has not provided that--nor indeed, could it provide--that Defendants can be jailed for anything other than the proved commission of specific criminal offenses. Nor did Congress create any new powers in the Parole Board in the 1970 act or in its other expressions of concern for the organized crime problem. Certainly there is considerable doubt whether Congress could constitutionally provide, for example, that organized crime Defendants should be sentenced up to ten years for a crime for which other Defendants were to receive sentences up to five years, at least in the absence of a quite specific definition of a separate crime, one of whose elements was participation in some sort or criminal syndicate, carefully delineated. (Cf. 18 U.S.C. §1955.) Given this Constitutional doubt, it is very hard to see that the Parole Board has been authorized to reach exactly the same result by more circuitous methods, for Congress has foregone any attempt to do so.

Even if the regulations establishing the organized crime label are valid expressions of executive power, Plaintiff submits that the Government has failed to meet the definition of organized crime stipulated to by the Plaintiff and the Government.

"...a prisoner may be classified as a member of organized crime if the officials of the Parole Board have a reasonable basis in fact to conclude that the inmate was a prominent figure in a structured criminal syndicate composed of professional criminals who primarily rely on unlawful activity as a way of life." Masiello v. Norton, 364 F.Supp. 1133.

Turning to the evidence presented by the Government, we again note the great disparity between the Government's characterization of the evidence and the general insubstantiality of the testimony presented. It is, of course, for the Court to weigh the credibility of the Government's witnesses. It is respectfully submitted that in light of the facts (1) that juries have not believed these witnesses, some of whose testimony at the April 30 hearing was actually repetitive of their testimony at trials which resulted in acquittals; (2) that these poor souls are wholly dependent on the Government for their freedom from jail and for their support and maintenance; and (3) that the broad allegations of the Government's hearsay Affidavits and reports appears greatly shrunken and dwindled when the conclusions are attempted to be supported by specific testimony--that the three witnesses are not worthy of belief.

Even if the testimony were found by the Court to be wholly credible, Plaintiff submits that the evidence does not measure up to the standard set down in Masiello, but rather amounts to little more than name calling pebbled with a few solitary incidents blown up in these witnesses imaginations by rumor and hearsay. In particular, the Government has wholly failed to show the existence of any "structured criminal syndicate" however composed.

III.

In United States v. Giordano, _____ U.S. _____ the Supreme Court held that the Congress meant what it said in 18 U.S.C. §2516 (1) when it limited authorization for wiretap application to the Attorney General or any Assistant Attorney General specially designated

regulations has added significance in this case because of the important safeguard these regulations can supply.

by the Attorney General. 52515 provides that conversations overheard on such unauthorized wiretaps may not be received in evidence before, inter alia, this Court or the Board of Parole.

Mr. Boreanaz stated at the hearing that it was his understanding that the wiretap application had not been properly authorized. The Government now claims that it was, in fact, properly authorized. Plaintiff suggests that if the Government now wishes to present evidence as to the purported authorization of the wiretap application in this case, a hearing should be held on the matter.

However, at the hearing of this matter, Government counsel conceded at page 105 of the transcript that the overheard conversations were not "sufficient to try any kind of an extortionate credit case". It is submitted then that the Government has already admitted the insubstantiality of this evidence, and that therefore, even if admissible, could not effect the result.

CONCLUSION: For all the aforementioned reasons, it is respectfully submitted that this Court should order the Plaintiff discharged from federal custody.

Respectfully submitted,

Philip B. Abramowitz, Of Counsel
MAROCHE, COLLESANO, ABRAMOWITZ & CELLER
Office and Post Office Address
76 Niagara Street
Buffalo, New York 14202
Tel. No. 855-0717

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,
Plaintiff-Petitioner,
v.
UNITED STATES BOARD OF PAROLE,
ET AL.,
Defendants-Respondents

Civil Action Nos.
74-365 and
74-580 (Consolidated)

DEFENDANTS-RESPONDENTS' SUPPLEMENTAL
MEMORANDUM OF LAW

PRELIMINARY STATEMENT

When petitioner Albert M. Billiteri was considered for parole in January, 1975, the Board of Parole utilized its paroling policy guidelines, 28 CFR § 2.20, in reaching its decision to deny parole and continue Mr. Billiteri to the expiration of his sentence. In evaluating Mr. Billiteri's case under its guidelines, the Board rated Mr. Billiteri's offense behavior as "very high severity because it involved extortion which is in the very high severity [category] of the Board's guidelines." Petitioner has challenged this severity rating, claiming that the Board could not rate his offense severity the same as that for extortion because he pleaded guilty merely to conspiracy to grant and collect extortionate credit, the substantive counts charging extortion having been dismissed on the government's motion.

ARGUMENT

- I. HAVING FAILED TO PURSUE ADMINISTRATIVE REMEDIES ESTABLISHED BY PAROLE BOARD REGULATIONS, PETITIONER SHOULD NOT BE PERMITTED TO CLAIM IN THIS COURT THAT THE PAROLE BOARD SHOULD HAVE DECIDED HIS CASE DIFFERENTLY.

On the notice of action dated January 15, 1975, by which petitioner was informed of the Board's most recent decision in

his case, petitioner was informed that he could appeal that decision within thirty days. The appeal procedure from original jurisdiction decisions of the Board is set out in detail at 28 CFR § 2.27. At the time petitioner's case was decided ^{1/} that section provided as follows:

§2.27 Appeal of original jurisdiction cases.

(a) Cases decided under the procedure specified in § 2.17 may be appealed within thirty days of the entry of the decision to the National Appellate Board. The National Appellate Board, upon the concurrence of two members, may affirm the decision or schedule the case for a review by the entire Board at its next quarterly meeting. A quorum of five members shall be required and all decisions shall be by a majority vote. The Chairman shall vote on the decision only in the absence of a member. This appellate decision shall be final.

(b) If an appellate hearing is scheduled, attorneys, relatives, or other interested parties who wish to speak for or against parole at such hearing must submit a written request to the Chairman of the Board stating their relationship to the prisoner and the general nature of the material they wish to present. The Chairman shall determine if the requested appearances will be permitted.

(c) If no appeal is filed within thirty days of the entry of the Regional Directors' decision, this decision shall stand as the final decision of the Board.

(d) The bases for this appeal shall be the same as for a regional appeal as set forth in § 2.25(d).

The affidavit of John F. Sicoli, dated May 30, 1975, reveals that no appeal from the January, 1975, decision was submitted by the petitioner. Instead, petitioner came directly to this Court to dispute the Board's placement of his

^{1/} The procedure for original jurisdiction decisions at both the initial and appellate stages has subsequently been revised. See 40 Fed. Reg. 10975, 10980 (March 10, 1975).

offense behavior in the very high severity category. This course of action by petitioner frustrates the orderly operation of the procedures established by the Parole Board for consideration of cases. The Board's administrative appeal procedure was designed to improve the administration of the parole system by allowing parole applicants to dispute the conclusions reached in the initial decision. The severity rating given a case is an element of the parole decision which lends itself especially well to effective review on the administrative appeal. Cf. Lupo v. Norton, 371 F.Supp. 156, 162 (D. Conn. 1974). Since the types of offense behavior typical of each severity category are listed on the severity scale of the guidelines, a prisoner who believes that his offense behavior has been overrated has merely to describe the factual circumstances of his offense and explain to the Board why he feels that conduct is more like the offense behaviors listed for a lower category. Since the petitioner has bypassed this opportunity for administrative review of his severity rating, he should not be allowed to obtain judicial review of that same determination. Talerico v. Warden, No. 75-134 Civil (M.D. Pa., March 4, 1975)(copy attached).

The doctrine of exhaustion of administrative remedies is essential in considering prisoner petitions just as it is in other administrative settings. By developing formal administrative review procedures, the Board of Parole and Bureau of Prisons have expressed a willingness to correct errors in their own actions. Failure to utilize available administrative remedies is a widely accepted basis for dismissal of prisoners' lawsuits.

See Waddell v. Alldredge, 480 F.2d 1078 (3d Cir. 1973); Thompson v. United States, 492 F.2d 1082 (5th Cir. 1974); Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974); Frazier v. Ciccone, 506 F.2d 1022 (8th Cir. 1974); Smoake v. Willingham, 359 F.2d 386 (10th Cir. 1966); Kochie v. Norton, 343 F.Supp. 956 (D. Conn. 1972).

extortionist, he has been reasonably and properly given the very high severity rating which his crime supports.

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It is expected that petitioner will respond by claiming that pursuit of administrative remedies would have been futile for him because he is seeking judicial review not of the conclusion reached by the Parole Board but of the Board's legal authority to consider aggravating circumstances of a prisoner's offense behavior not mentioned in the indictment. Such a contention must be rejected. It might be that the actual circumstances of petitioner's offense behavior warrant something less than a "very high" severity rating. However, petitioner's refusal to inform the Board why his offense behavior should be rated differently must be taken by the Board to be an acceptance of "very high" rating. Thus, the posture of this issue as it presently stands before the Parole Board is not merely a "very high" severity rating based on alleged behavior, but a "very high" rating based on undisputed alleged behavior.

II. THE PAROLE BOARD ACTED PROPERLY WITHIN THE SCOPE OF ITS DISCRETION IN RATING PETITIONER'S OFFENSE BEHAVIOR AS "VERY HIGH" SEVERITY

This Court's decision of November 26, 1974, in this case correctly observed that the Parole Board's regulations allow the consideration of alleged offenses. The present case illustrates very well the necessity for an inquiry beyond the statutory definition or the indictment's description of the crime for which the prisoner was convicted. The Parole Board's guidelines do not list the offense of "conspiracy" in any particular offense severity category. Indeed, it would be foolish to do so in light of the wide varieties of offenses persons could conspire to commit, from defacing a coin to carrying out mass murders. Since petitioner was convicted on a guilty plea, it is impossible to inquire into a trial transcript to determine

what facts were proven to establish the offense. Reference to the indictment has only limited usefulness. It discloses that the conspiracy in this case was to violate the Extortionate Credit Act, 18 U.S.C. § 891, et seq. over a period of time from June 1, 1968, to July 15, 1969. ^{2/} However, nothing is learned of the culpability of the individual conspirators or the extent to which the conspiracy was executed.

In these circumstances, it is the duty of the sentencing court and the Board of Parole to look to sources beyond the indictment in order to make informed decisions on the facts of individual cases. To give identical treatment to each violation of the same statute would make the sentencing or parole decision making process unduly mechanical and blind to reality. In order to achieve individual consideration of each case on its merits, sentencing courts and parole boards have traditionally referred to descriptions of the details of offenses contained in presentence reports. Consideration of such reports have been consistently upheld by appellate courts even though they may contain descriptions of criminal conduct for which the defendant has not been convicted. In United States v. Doyle, 348 F.2d 715 (2d Cir. 1965), cert. denied, 382 U.S. 843, the Court of Appeals for this Circuit specifically addressed the question of a sentencing court's consideration of information relating to counts of an indictment which have been dismissed:

... The narrowing of the indictment to a single count limits the maximum punishment the court can impose but not the scope of the court's consideration within the maximum. The dismissal of the other counts at the Government's request was not an adjudication against it on the merits, even though, as a result of the statute of limitations, no further prosecution can occur for the offenses there charged. The aim of the sentencing court is to

^{2/} The fact that the offense behavior extended over more than a year, involving multiple separate offenses, is itself an aggravating factor in this case.

acquire a thorough acquaintance with the character and history of the man before it. Its synopsis should include the unfavorable, as well as the favorable, data, and few things could be so relevant as other criminal activity of the defendant, particularly activity closely related to the crime at hand. Counsel suggests that although a "criminal record" may be considered, crimes not passed on by a court are beyond the pale, but we see nothing to warrant this distinction. Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). Of necessity, much of the information garnered by the probation officer will be hearsay and will doubt less be discounted accordingly, but the very object of the process is scope and the defendant is always guarded by the statutory maximum. To argue that the presumption of innocence is affronted by considering unproven criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions. 348 F.2d at 721.

In United States v. Tucker, 404 U.S. 443, 447 (1971), the Supreme Court cited with approval the above quoted holding in Doyle. Consideration of unproven offenses for sentencing purposes has been upheld in numerous other decisions. See, e.g., United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972) (evidence on charges of which defendant was acquitted); United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir. 1968).

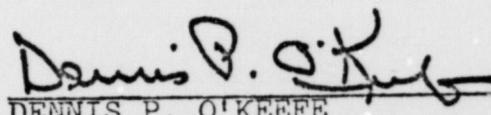
In Lupo v. Norton, supra, it was recognized that the Board of Parole, like the sentencing court, must be able to refer to sources other than the statutory definition of the commitment offense in deciding whether or when to parole a prisoner. Since the parole eligibility statutes give the Parole Board a large part of the responsibility for deciding how long prisoners must remain in prison, it is imperative that the Board be allowed to consider the same information used by the sentencing court. To require the Parole Board to act on less information would result in uninformed parole release decisions which would nullify the informed decision by sentencing judges.

CONCLUSION

For these reasons, the Court should deny the relief sought by the petitioner in these cases.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney


DENNIS P. O'KEEFE
Attorney, Department of Justice

DATED: June 3, 1975

AT: Buffalo, New York

A F F I D A V I T

I, John F. Sicoli, being duly sworn, depose and state as follows:

1. I am Senior Case Analyst of the Northeast Region of the U.S. Board of Parole with offices located at Scott Plaza II, Industrial Highway and Tinicum Township, Philadelphia, Pennsylvania.

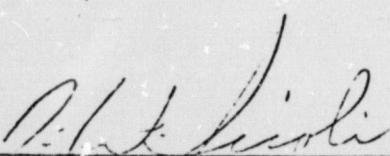
2. I have examined the file of Albert M. Billiteri, Register Number 87332-132, and find as follows:

Mr. Billiteri's parole case was considered on January 13, 1975 by the Board's Regional Directors acting en banc pursuant to 28 C.F.R. Section 2.17, in compliance with a court order of November 26, 1974. The Board issued an order on January 15, 1975, that no change be made in the previous order to continue his case to the expiration of his sentence.

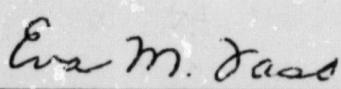
Mr. Billiteri has failed to take an administrative appeal from this decision pursuant to 28 C.F.R. Section 2.27. Mr. Billiteri had, under this regulation, thirty days from the entry of the decision in his case to appeal to the entire Board at its next quarterly meeting. Failure to perfect an appeal thereby allowed the decision of January 15, 1975, to stand as the final decision of the Board, as set forth in 28 C.F.R. Section 2.27(c).

5/30/75

DATE


JOHN F. SICOLI, Senior Analyst
Board of Parole, Northeast Region
Philadelphia, Pennsylvania

Subscribed and sworn to before me this 30 day of May 1975


Notary Public

EVA M. FASO, Notary Public
Tinicum Twp., Delaware Co., Pa.
My Commission Expires October 2, 1978

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES VINCENT TALERICO,
Petitioner,

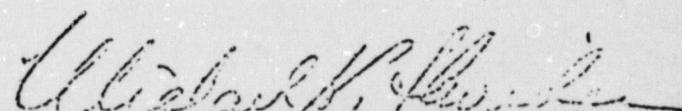
v.

No. 75-134 Civil

WARDEN, U. S. PENITENTIARY,
U. S. BOARD OF PAROLE,
Respondents.

ORDER

In accordance with the memorandum this day filed,
It is ORDERED that the petition for a writ of habeas
corpus is denied, and the action is dismissed for failure to
exhaust administrative remedies.


Michael H. Keller
Chief Judge
Middle District of Pennsylvania

Dated: March 7, 1975.

FILED

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES VINCENT TALERICO,

Petitioner,

v.

No. 75-134 Civil

WILDEMAN, J. S. PENN WITNESS,
U. S. BOARD OF PAROLE,

Respondents.

FILED

MAR 4 1975

DONALD R. BERRY, Clerk
AAR, CJA
Deputy Clerk

APPEARANCES:

For Petitioner: Pro Se

For Respondents: S. John Cottone
U. S. Attorney
Post Office Building
Scranton, Pa.

Michael D. McDowell
Assistant U. S. Attorney
Federal Building
Lewisburg, Pa.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES VINCENT TALERICO, :
Petitioner, :
v. : No. 75-134 Civil
WARDEN, U. S. PENITENTIARY, :
U. S. BOARD OF PAROLE, :
Respondents. :
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U. S. BOARD OF PAROLE
MEMORANDUM LEGAL

Petitioner, James Vincent Talerico, presently an inmate at the United States Penitentiary, Lewisburg, Pennsylvania, filed a petition for a writ of habeas corpus in which he alleges that the United States Board of Parole has denied him his release on parole unlawfully. A rule to show cause why the relief requested should not be granted was issued, and a response was filed. Petitioner submitted a traverse to the response. Thereafter, respondents filed a supplemental response. The following undisputed facts emerge from the pleadings.

Petitioner was sentenced in July 1973 to seven years imprisonment for extortion pursuant to 18 U.S.C.A. § 4208(a)(2). On February 21, 1974, an in-person parole hearing was held and on March 4, 1974, the prisoner was denied parole and continued in confinement with no institutional privilege pending scheduled for February 1976. In addition, recently and most recently, a review by an examiner panel on the record of the one-third point of his sentence in accordance with the provisions in *Bliford v. Warden, M.W. Pa. 1974, 387 F. Supp. 11*

and deWyver v. Warden, W.D. Pa. No. 74-311, 380 F. Supp. 1073 (decided December 23, 1974). The reason given by a Parole Board for its decision to deny parole was that petitioner's release at this time would depreciate the seriousness of the offense committed and thus is incompatible with the welfare of society, 39 Fed. Reg. 32 2.18, 2.20 (1974). See deWyver v. Warden, *supra*; Kohlmay v. Norton, D. Conn. 1974, 380 F. Supp. 1073, 1074; Wiley v. United States Board of Parole, N.D. Pa. 1974, 380 F. Supp. 1194, 1197; Battle v. Norton, D. Conn. 1973, 365 F. Supp. 925.

Petitioner appealed pursuant to 39 Fed. Reg. § 2.25 (1974) the hearing examiner panel's adverse parole decision to the Regional Director, who affirmed the panel's decision on April 15, 1974. Petitioner did not then appeal to the National Appellate Board as provided in 39 Fed. Reg. § 2.26 (1974).¹ Decisions of the National Appellate Board constitute the final decision of the United States Parole Board, 39 Fed. Reg. § 2.26(c) (1974). Respondents request the court to

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39 Fed. Reg. § 2.26 (1974) provides:

"2.26 Appeal to National Appellate Board.

(a) A prisoner may file a written appeal of the Regional Director's decision under § 2.25 to the National Appellate Board on a form provided for that purpose within thirty days after the entry of the Regional Director's written decision. The National Appellate Board may, upon the concurrence of two members, affirm, modify, or reverse the decision, or order a rehearing at the institutional or regional level.

(b) The bases for such appeal shall be the same as for a regional appeal as set forth in § 2.25. However, any matter not raised on a regional appeal appeal may not be raised on appeal to the National Appellate Board.

(c) Decisions of the National Appellate Board shall be final.

discuss the petition of the ground that petitioner has failed to exhaust his administrative remedies.

Federal prisoners must exhaust administrative remedies before seeking habeas corpus relief. Soyra v. Alldredge, 3 Cir. 1973, 481 F. 2d 303; see Waddell v. Alldredge, 3 Cir. 1973, 480 F. 2d 1078. Before a federal prisoner can bring a habeas corpus proceeding which challenges an adverse decision of the United States Parole Board, he must have availed himself of the available administrative procedures for review of that decision.

In the instant case petitioner admits he has not filed an appeal to the National Appellate Board as provided for in 39 Fed. Reg. § 2.26 (1974). Therefore, he has not obtained a final decision from the Parole Board.

Petitioner asserts that an appeal to the National Appellate Board is not presently available to him because the Board's regulations, 39 Fed. Reg. § 2.26 (1974), require that an appeal of the Regional Director's decision to the National Appellate Board must be taken within thirty days after the entry of the written decision of the Regional Director, that the thirty day period has expired, and hence he has in effect exhausted all available administrative remedies.

The court deems it imperative to note that while the exhaustion doctrine does not require that the National Appellate Board has actually ruled on the merits of petitioner's claims, it does require that the Appellate Board has had his contentions presented to it, thereby giving the Board an opportunity to review the parole decision rendered. U.S. v. United States of America ex rel. Geisler v. Tolson,

3 Cir. No. 73-1034 Civil (filed February 5, 1975); Volmar v. United States, 1969, 395 U. S. 185, 194-195; Noyd v. Board, 1969, 395 U. S. 663; cf. Preiser v. Rodriguez, 1973, 411 U. S. 475.

The basic premises underlying the exhaustion requirement are that (1) judicial time and effort may be conserved because the agency might grant the relief sought; (2) judicial review may be facilitated by allowing the agency to develop a factual record and apply its expertise; and (3) administrative autonomy requires that an agency be given an opportunity to correct its own errors. United States ex rel. Marrero v. Warden, 3 Cir. 1973, 483 F. 2d 656, 659, rev'd on other grounds, 1974, 42 U.S.L.W. 4955; McKart v. United States, 1969, 395 U. S. 185, 194-195. In addition, ". . . it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." McKart v. United States, 395 U. S. at 195.

In the instant case, if the court were to allow a prisoner to simply wait until the time prescribed by the regulations for filing an appeal to the National Appellate Board expired and then file a petition for a writ of habeas corpus which the court would consider on its merits, the doctrine of exhaustion of administrative remedies would be circumvented and wholly undermined. That is why the court in the instant case will dismiss the petition for a writ of habeas corpus for failure to exhaust administrative remedies.

Upon dismissal of this petition, relator may file a written appeal of the Regional Director's decision to the

National Appellate Board. The Board may decide to deny the appeal on the ground that it is untimely under 39 Fed. Reg. § 2.26 (1971), or the Board in its discretion may allow petitioner to file the appeal out of time and rule on the merits of his contentions. It is only after the petitioner has filed an appeal to the Appellate Board, thereby giving it the opportunity to rule on his contentions, that he will have exhausted his administrative remedies.

Even if this court were to accept petitioner's argument that he has exhausted his administrative remedies because the time period for filing an appeal to the National Appellate Board has expired, his petition might still be dismissed on the ground he deliberately bypassed an available administrative remedy and therefore should be denied an opportunity to assert his claims in federal court. *Fay v. Noia*, 1963, 372 U. S. 391, 438; *Henry v. Mississippi*, 1965, 379 U. S. 443; *Angle v. Laird*, 10 Cir. 1970, 429 F. 2d 892, cert. denied, 1971, 401 U. S. 918. The test for such deliberate bypass or waiver is an awareness of the availability of an administrative remedy and a decision not to use it made by the petitioner himself. *Angle v. Laird*, 429 F. 2d at 894; *Watkins v. Crouse*, 10 Cir. 1965, 344 F. 2d 927, 929. Where a federal habeas corpus petitioner has deliberately bypassed available state or administrative procedures and in doing so has forfeited his state or administrative remedies, a federal court in its discretion may deny habeas corpus relief. See *Montgomery v. Hopper*, 5 Cir. 1973, 488 F. 2d 677; *United States ex rel. Schaefer v. Follette*, 2 Cir. 1971, 447 F. 2d 1357; *Anderson v. Nelson*, 9 Cir. 1970, 439 F. 2d 55; *id.*

States ex rel. Navagro v. Johnson, E.D. Pa. 1973, 365 F. Supp. 676; United States ex rel. Brown v. Russell, E.D. Pa. 1973, 318 F. Supp. 76.

The deliberate bypass doctrine is essential to the vitality of the exhaustion of administrative remedies doctrine established in Soyka v. Alldredge, 3 Cir. 1973, 481 F. 2d 363. Without the deliberate bypass doctrine, administrative review procedures could be avoided simply by waiting for prescribed time periods for administrative appeal to run.

Since the court has decided for the aforementioned reasons that petitioner has failed to exhaust his administrative remedies, the court at this time makes no judgment as to whether there has been a deliberate bypass of administrative procedures.

The court has discussed the deliberate bypass doctrine in order to impress upon those who seek review of Parole Board decisions that this doctrine, in combination with the exhaustion of administrative remedies rule, clearly requires federal prisoners to avail themselves of the means of administrative review of decisions of the hearing examiner panel, provided for under the regulations promulgated by the United States Parole Board, 39 Fed. Reg. §§ 2.24-2.27, before seeking federal habeas corpus relief.²

The petition for a writ of habeas corpus will be denied for failure to exhaust administrative remedies.

Michael J. Flynn
Judge
Middle District of Pennsylvania

Dated: March 17, 1975.

The doctrine of deliberate bypass, now established in the United States, is a judicially created rule, and is not a statutory provision.

Ciccone, 506 F.2d 1022 (8th Cir. 1974); Smoake v. Willingham,
359 F.2d 386 (10th Cir. 1966); Kochie v. Norton, 343 F.Supp.
956 (D. Conn. 1972).

-3-

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6 b. 11

Law Offices of
MARTOCHE, COLLESANO, ABRAMOWITZ & GELLER

STANLEY J. COLLESANO
SALVATORE R. MARTOCHE
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PHILIP B. ABRAMOWITZ
LINDA L. CLEVELAND

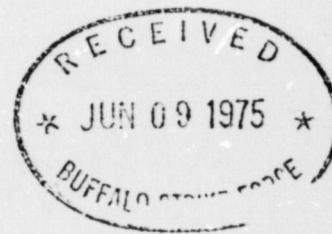
76 NIAGARA STREET
BUFFALO, NEW YORK 14202

TELEPHONE 855-0717
AREA CODE 716

June 6, 1975

Honorable John T. Curtin
Chief Judge
United States District Court
United States Court House
Buffalo, New York 14202

Re: Billiteri vs. Board of Parole
74-580 and 74-365



Dear Judge Curtin:

I wish to take this opportunity to very briefly respond to the Government's most recent memorandum in the above referenced case sent in a letter dated June 3, 1975. The Government alleges for the first time in this action that Mr. Billiteri has failed to exhaust his administrative remedies. This contention must be viewed in light of the history of this litigation.

This case initially appeared before this Court after Mr. Billiteri had already exhausted his administrative remedies at which time this Court remanded the case back to the Board of Parole in an Order dated November 26, 1974 which required that

"...the Defendant discharge the Plaintiff from Federal custody unless within 30 days the United States Board of Parole reconsiders his application for release in a matter consistant with this opinion."

This Court also stated in an Order dated January 6, 1975

"...the Defendants are directed to respond to the allegations raised in moving papers of the Plaintiff in a matter most likely to appraise the Court of the substance of their defense...on January 16, 1975 at 2 p.m.."
(Page 3 of Order dated January 6, 1975)

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Honorable John T. Curtin
June 6, 1975
Page 2

Now, for the first time on June 3, 1975, the Board asserts that there has not been an exhaustion of the Billiteri case which has been remanded with instructions that the Board of Parole act and make a final determination within 30 days of the November 26, 1974 Order.

The problem in this case has always been that time meant nothing for the Government but everything for the Defendant. Now, at this late date in an Affidavit dated May 30, 1975, John F. Sicole states that Mr. Billiteri should have appealed the "January 15, 1975 Order denying him parole (at which he was not permitted to have an attorney present)...to the entire Board at its next quarterly meeting"--presumably on April 15, 1975.

I would submit that the clear language of this Court's opinions of November 26, 1974, and January 6, 1975, demonstrate that the Court directed the United States Board of Parole to make a final decision which could be reviewed by this Court.

Finally, I would like to point out that United States District Courts may review administrative proceedings if the Petitioner has either "exhausted" his administrative remedies or if it would have been "futile" to exhaust his administrative remedies. In this case, I most respectfully submit that it would have been futile for Mr. Billiteri to have waited three months for another panel to meet to review the decision made on January 15, 1975, when the Board itself refused to permit Mr. Billiteri to have an attorney present at that January 15, 1975 parole meeting.

Please also see American Broadcasting Co. v. Federal Communication Commission, 191 F.2d 492, 501 where the Court said:

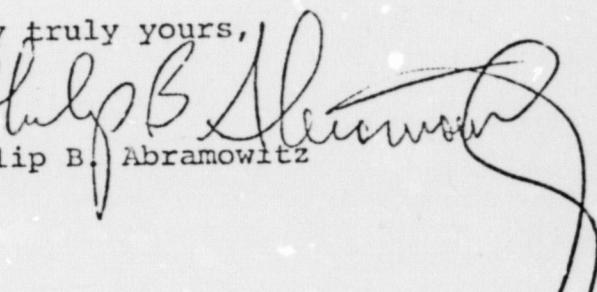
"Agency inaction can be as harmful as wrong action. The Commission cannot, by its delay substantially nullify rights which the act infers though it preserves them in form." Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327

In this case, Board of Parole's constant attempt to delay this action is clearly as harmful as "wrong action". Mr. Billiteri can never regain the days which he spends in jail away from his wife and family.

Honorable John T. Curtin
June 6, 1975
Page 3

I most respectfully request that this Court look through the smoke screen of the Parole Board's most recent memorandum and order Mr. Billiteri released from Federal custody.

Very truly yours,


Philip B. Abramowitz

PBA/sg
cc: Dennis O'Keefe
Department of Justice
Genesee Building
Buffalo, New York 14202



UNITED STATES DEPARTMENT OF JUSTICE
ORGANIZED CRIME AND RACKETEERING SECTION
WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

29.
Buffalo Field Office
921 Genesee Building
Buffalo, New York 14202

DPO:am

July 1, 1975

Hon. John T. Curtin
United States District Court Judge
United States Courthouse - 6th Floor
Niagara Square
Buffalo, New York 14202

RE: Billiteri v. The Board of Parole et al.
Civ. 74-365 and Civ. 74-580

Dear Judge Curtin:

In the Board's Memorandum of May 19, 1975, at the bottom of page 21, the Government advised the Court that the electronic eavesdropping in this case had been properly authorized and, therefore, the Court should consider a transcript of such eavesdropping which had been offered in evidence by the Government in the course of the Parole Hearing.

The attached memorandum of Arthur D. Porcella indicates that the Department of Justice has been unable to locate a document necessary to the authentication of the propriety of the original authorization; wherefore the Government hereby withdraws the transcript of eavesdropping which it had earlier offered to the Court.

Very truly yours,

DENNIS P. O'KEEFE
Department of Justice Attorney

Att.

cc: Mr. John K. Adams.
U.S. District Court Clerk

Philip B. Abramowitz, Esq.

Harold J. Boreanaz, Esq.



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UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Robert C. Stewart
Attorney-in-Charge, Buffalo Strike Force
ATTENTION: Dennis O'Keefe

FROM : Arthur D. Porcella
Attorney
Special Operations Unit

SUBJECT: Albert M. Billiteri v. United States Board of Parole, et al.,
Civil Nos. 74-365, 74-580

DATE: June 24, 1975
ADP:vda

This is in reply to your memoranda of May 21, and May 28, 1975, requesting an affidavit concerning three electronic interception authorizations relating to an investigation of Albert M. Billiteri.

When I informed Mr. O'Keefe recently that we had been unable to locate any information in this Unit relating to an authorization of June 9, 1969, he requested that we communicate that information to you in writing. Mr. O'Keefe also cancelled the request for an affidavit.



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

CIV. 74-365 and
CIV. 74-580
(Consolidated.)

-v-

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

GOVERNMENT'S ANSWER TO PETITIONER
BILLITERI'S REQUEST TO BE ADMITTED TO
BAIL PENDING THE DECISION IN THIS MATTER

Now comes the United States of America, by and through its attorneys, Richard J. Arcara, United States Attorney, and Dennis P. O'Keefe, Department of Justice attorney, and answers Petitioner Billiteri's request for bail - pending a decision in this matter - as follows:

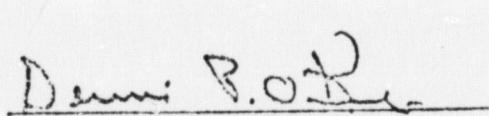
The Government submits that this Court has the right to examine the decision by the Parole Board in denying Mr. Billiteri's parole, to determine whether or not the Board acted within its own rules and regulations. However, the Government further submits that the Court is without jurisdiction to grant bail to Mr. Billiteri pending the Court's decision in this matter. See United States v. Minker, 326 F.2d 411 (3rd Cir. 1964).

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney

DATED: March 27, 1975

AT: Buffalo, New York


DENNIS P. O'KEEFE
Department of Justice Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

-vs-

UNITED STATES BOARD OF PAROLE and
MEMBERS OF THE UNITED STATES BOARD OF PAROLE,
INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY
and THE UNITED STATES OF AMERICA,

Civ-74-365

Defendants

ALBERT M. BILLITERI,

Plaintiff

-vs-

UNITED STATES BOARD OF PAROLE,

Civ-74-580

Defendant

NOTICE OF APPEAL

The above named appellant, United States Parole Board et al., hereby
appeals to the United States Court of Appeals for the Second Circuit from the
Order of the Honorable John T. Curtin dated September 17, 1975 in the above-
captioned matters.

ATED: November 11, 1975

RICHARD J. ARCARA
United States Attorney
Western District of New York

AT: Buffalo, New York

BY:

DENNIS P. O'KEEFE
Department of Justice Attorney

RECEIVED

SEP 19 1975

U. S. BOARD OF PAROLE
LEGAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

-vs-

Civ-74-365

UNITED STATES BOARD OF PAROLE, et al.,

Defendants

ALBERT M. BILLITERI,

Plaintiff

-vs-

Civ-74-580

UNITED STATES BOARD OF PAROLE,

Defendant

DECISION
and
ORDER

CURTIN, DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ALBERT M. BILLITERI,

Plaintiff

-vs-

Civ-74-365

UNITED STATES BOARD OF PAROLE and
MEMBERS OF THE UNITED STATES BOARD
OF PAROLE, INDIVIDUALLY AND IN THEIR
OFFICIAL CAPACITY and
THE UNITED STATES OF AMERICA,

Defendants

ALBERT M. BILLITERI,

Plaintiff

-vs-

Civ-74-580

UNITED STATES BOARD OF PAROLE,

Defendant

APPEARANCES: PHILIP B. ABRAMOWITZ, ESQ.
Buffalo, New York, for Plaintiff.

RICHARD J. ARCARA, ESQ.
United States Attorney
(DENNIS P. O'KEEFE, ESQ., Department of
Justice Attorney, of Counsel), Buffalo,
New York, for the Government.

These actions were consolidated. They con-
cern the parole of Albert M. Billiteri, who was fined

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and sentenced to a term of five years in 1972 by the late Chief Judge John O. Henderson after entering a guilty plea to a violation of the general conspiracy statute, 18 U.S.C. §371.

In March of 1974 the United States Board of Parole issued an order which denied parole and provided that Billiteri remain incarcerated until the expiration of his five-year term. The reason cited for the Board's decision was:

Your release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society.

Following administrative appeals, Billiteri sought relief from this court. In Billiteri v. United States Board of Parole, 385 F.Supp. 1217 (N.D.N.Y. 1974) [hereinafter "Billiteri I"], this court remanded the question of Billiteri's parole release to the Board for re-consideration. The record in Billiteri I revealed that the Board had proceeded on the assumption that Billiteri had been convicted of both conspiracy and extortion. Billiteri's conviction, in fact, was for conspiracy only. The placement of the wrong offense in the Board's parole

guidelines, however, determined the outcome. Therefore, the Board's stated reason for denying parole, to wit, the seriousness of the offense committed, was deemed clearly erroneous. The court also criticized the boilerplate language the Board used to deny the plaintiff parole which failed to state the facts upon which the conclusion was based. In Billiteri I, the court acknowledged the commendable effort of the Board in establishing parole determination guidelines (28 C.F.R. 52.1 et seq.). Billiteri's offense severity was not specified, however, so the Board was directed to also reconsider the placement of Billiteri's "offense behavior" in the guidelines and was directed to complete the reconsideration within thirty days.

At the expiration of the thirty-day period, an order issued directing the Board to show cause why Billiteri should not be released because the Board failed to comply with the requirements of the order in Billiteri I. In addition, a new action was simultaneously commenced which alleged that Billiteri's organized crime connections had played a substantial part in denial of his parole.

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The two cases were considered together and an initial return date was scheduled. On the date of the return, the government submitted affidavits and other documents indicating that the Board was attempting to substantially comply with the court's order. The court thereafter directed that the government make a full and complete return within ten days, the additional period designed to permit the Board to complete its reconsideration. On January 16, 1975 the government submitted affidavits and records regarding the Board's January 13, 1975 determination to continue Billiteri to the expiration of his term, to wit, sustaining the prior determination.

From the government's return, it became apparent that the question of Billiteri's organized crime connections had in fact played a significant role in the procedures followed by the Board in conducting the re-determination.² Furthermore, the placement of Billiteri's offense behavior in the Parole Board's guidelines (28 C.F.R. §2.20) had not received attention consistent with the remand decision in Billiteri I. [For a complete discussion of the reconsideration afforded Billiteri by the Board, see this court's decision in Billiteri v.

United States Board of Parole, 391 F.Supp. 260 (N.D.N.Y. 1975), hereinafter "Billiteri III".]

As a consequence, the court declined to remand Billiteri's parole problem to the Board for yet another reconsideration. Instead, a hearing was scheduled before the court for the specific purpose of taking testimony on the question of Billiteri's offense behavior, and on the question of Billiteri's organized crime connections. That hearing was held on April 30, 1975 and the parties have submitted numerous memoranda relative thereto.

Before discussing the hearing conducted before this court, it is necessary to discuss a question raised by the government for the first time in a supplemental post-hearing memorandum filed June 9, 1975. The government alleges that Billiteri failed to exhaust the available administrative remedies following the Board's determination of January 13, 1975. This argument must be rejected.

The Board's decision of January 13, 1975 was occasioned by the order of this court in Billiteri I, after the government had asked for and received additional

time to report to this court on the reconsideration ordered in Billiteri I. On January 16, 1975, when the government first submitted the results of the reconsideration to the court, the issue of exhaustion of administrative remedies was neither argued nor raised. On April 4, 1975, when the decision in Billiteri II to hold a hearing in federal court was filed, the government did not appeal. The exhaustion of remedies question was not raised on April 28, 1975, in the government's pre-hearing memorandum, in the government's closing arguments on the day of the hearing, or in the government's initial memorandum following the hearing submitted May 19, 1975.

It is clear that the decision in Billiteri II manifested a finding that further reference of Billiteri's case to the Board would be inequitable. Initially the Board had overstepped the time frame within which this court had ordered a reconsideration to take place. Secondly, the court specifically found that the question of the placement of Billiteri's offense behavior was not dealt with in a manner consistent with the court's direction. Thirdly, the element of the organized crime

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designation and the original jurisdiction treatment had been abruptly injected into the case, surprising the plaintiff. Furthermore, there is no procedure which an inmate can institute within the administrative process for review of an organized crime/original jurisdiction designation. This is particularly true for Billiteri because the Board persistently maintained that the organized crime/original jurisdiction designation played no part in the proceedings, although Billiteri II found to the contrary.

It is, therefore, apparent that Billiteri has exhausted the available administrative procedural processes at least once on the question of offense behavior. In addition, resort to administrative processes for the purposes of the organized crime designation appears to be futile.

A separate and distinct basis, however, for rejecting the government's argument lies in the inherent power of a federal court to see its orders enforced. Once having found in Billiteri II that the Board's re-consideration failed to comport with the directions contained in Billiteri I, this court could have directed the

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immediate parole of Billiteri. Grasso v. Norton, No. 74-1222 (2d Cir. slip op. June 23, 1975). It was the court's judgment, however, that a hearing in open court would further the interests of the plaintiff and the government in seeing these difficult questions resolved. Therefore, the hearing held on April 30, 1975 was scheduled.

FINDINGS OF FACT

The testimony at the hearing immediately focused on the organized crime connections of the plaintiff Billiteri. The government produced three individuals who are currently participants in the government's witness protection program. All were convicted felons and admitted professional criminals. All had been acquainted with the plaintiff for several years preceding the plaintiff's conviction in this court.

Gregory Parness, who testified that he had performed several hundred burglaries in the late 60's in the Buffalo area, first became acquainted with Billiteri in 1967. According to his testimony, when he offered to

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sell Billiteri stolen property on various occasions, they were generally unable to agree on an acceptable price. On one occasion, however, when Parness agreed to sell Billiteri some stolen property for \$1500, Billiteri paid him only \$900 and reneged on the remaining sum agreed upon. On another occasion, he borrowed \$200 from Billiteri, with the understanding that he would repay \$240 within thirty days.

The most significant testimony that Parness offered related to a burglary of a Buffalo furrier. According to Parness, the stolen furs were sold to an individual in the New York City area. Subsequently, Billiteri and a Sam Lagatutta contacted Parness and his partners in crime and demanded \$1,000 from each of the burglars for failing to offer the furs to Billiteri and Lagatutta before selling them out of town. When the three burglars refused to pay, they were beaten until they agreed.

Parness also testified in regard to an aborted burglary of a jewelry store. Billiteri had apparently furnished a tool critical to the success of the burglary

in exchange for a percentage of the loot. Furthermore, Parness said he later had rings made for both Billiteri and Lagatutta with stones stolen in another burglary. The gift of these rings was characterized as "tribute."

Joseph Zito, formerly of Batavia, New York, testified that he was a bookmaker and associated with a criminal syndicate operating in New York City. Zito's testimony focused on an incident in which he attempted to collect at least a partial payment on an unsecured loan made to a resident of Buffalo. When Zito returned for the payment, Billiteri, who was present, told Zito that he had no business being there and loaning money to Billiteri's clients. This "jurisdictional dispute" was resolved by having Billiteri eventually collect the loan. Zito also testified that Billiteri's reputation was as a bookmaker for the local criminal syndicate.

The government's final witness was Russell DeCicco, who testified that he was introduced into the Buffalo "family" by one Fred Randaccio in 1971. DeCicco and Randaccio became friends while both were inmates in

Leavenworth. Upon arrival in Buffalo, DeCicco was assigned to work specifically with Billiteri. During this time, DeCicco was paid \$100 a week, for which he performed no work. DeCicco testified that Billiteri claimed he ran a bookmaking and loan sharking operation which grossed \$8,000 to \$9,000 per week. DeCicco also said that he never saw Billiteri at the place where Billiteri's reputed bookmaking operation was being conducted. DeCicco related an incident when he accompanied Billiteri on a visit to a Buffalo businessman for the purpose of discussing an overdue loan. DeCicco testified, however, that no force or violence was either threatened or used.

DeCicco was apparently involved in the burglary of the Buffalo furrier which was prominent in Gregory Parness's earlier testimony. He said that he was the one who arranged for the furs to be sold in New York City. DeCicco also made a deal with Billiteri in regard to the unsold furs, by furnishing Billiteri with a list of the size and the type of the remaining furs so that Billiteri could match them with customers. The alleged scheme was frustrated, however, when the furs were discovered by

authorities and confiscated. DeCicco also corroborated some of Parness's testimony in regard to Billiteri's forcible exaction of \$1,000 from each of the furrier burglars.

There were no other witnesses at the hearing. The government introduced grand jury and wiretap transcripts obtained during the investigation which led to Billiteri's indictment, plea, sentence and subsequent parole problems.

Billiteri did not testify. The only proof his attorneys submitted consisted of materials brought to the attention of Judge Henderson at the time of sentence, including letters of reference regarding Billiteri's character and standing in the community.

CONCLUSIONS OF LAW

The parties are agreed that the applicable standard for judging the organized crime designation should be that propounded by District Judge Zampano in Masiello v. Norton, 364 F.Supp. 1133 (D.Conn. 1973), wherein the court said:

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. . . a prisoner may be classified as a member of organized crime if the officials of the Parole Board have a reasonable basis in fact to conclude that the inmate was a prominent figure in a structured criminal syndicate composed of professional criminals who primarily rely on unlawful activity as a way of life.

364 F.Supp. at 1135.

In my judgment, the Board has sustained its burden under this standard. The testimony regarding the "jurisdiction" which Billiteri had over loans and receipt of stolen property indicates that he held a position of some prominence in the local criminal world. This is further supported by the testimony regarding his bookmaking and loan sharking operation in which a number of other criminals were employed. Furthermore, all of the testimony in evidence indicates that Billiteri derived his livelihood from these various illegal activities.

The second question to be explored at the hearing, namely, how Billiteri's actual offense severity should be determined was not resolved. There was no testimony about this particular matter whatsoever. The

government did submit the testimony of several witnesses in the grand jury proceedings which led to the indictment of Billiteri. However, these witnesses, although sworn, have never been cross-examined. Furthermore, the credibility of some of these witnesses is open to some question. Without doubt, this was a major factor in the government's offering Billiteri a plea to conspiracy rather than going to trial on the substantive extortion offense charged.

At the time of the plea, Billiteri had recently been exonerated in another felony criminal proceeding. Two other felony criminal cases were pending against him. As a result of lengthy negotiations, a package plea was endorsed by both parties and accepted by Judge Henderson.

In the actual plea proceedings dated May 24, 1972, Billiteri pled very circumspectly in an attempt to avoid pleading to an offense which could be construed as a felony under New York law. The plea proceedings are
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appended as a footnote.

How this plea fits into the Parole Board's guidelines requires some explanation of the guidelines themselves. In a recent article, the Federal parole

release guideline procedures were thoroughly studied, explained and evaluated. Parole Release Decision Making and the Sentencing Process, 34 YALE L.J. 810. The Board uses a system in which its discretion in parole release determination has been structured. Two factors are considered, the salient factor score and the offense characteristics. The salient factor is a parole prognosis score which evaluates the inmate's past personal history and release plans. The scores are grouped in four categories, from very good (a score of 9 to 11) to poor (a score of 0 to 3). Offense characteristics are grouped in six categories, from low (minor theft) to greatest (espionage, hijacking and kidnapping).

The salient factors are grouped on the horizontal axis of a table. The offense characteristics form the vertical axis. The matrix which results has four points where each salient factor category intersects with each offense characteristic. At each point of intersection, a range of months has been set to represent the range of actual incarceration an inmate with that salient factor score and offense characteristic can expect to

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serve. The determination of Billiteri's salient factor score of 8, which is in the good category, is not in issue in this case. What is in issue is the assignment of Billiteri's offense to the very high severity category. On the table, Billiteri could expect to serve 36 to 43 months. If Billiteri's offense severity had been placed in one category below very high, he could expect to serve 20 to 26 months before obtaining his release. Therefore, the placement of the offense severity is of utmost importance in making the parole release determination. It is this determination which has been in question for some time in these proceedings.

The origin of the six offense severity categories is somewhat mysterious. The federal penal code provides for 13 different categories of offense severity if maximum sentence is the determining factor. 2 U.S. NAT'L. COMM'N. ON REFORM OF FEDERAL CRIM. LAWS, WORKING PAPERS 1250 (1970). The Board's categories, however, do not reflect the Congressional finding of offense severity. Parole Release Decision Making and the Sentencing Process, *supra* at 387. Furthermore, offenses not

specifically categorized are placed into categories by comparing their severity with those of similar offenses, with the qualification that if an offense can be listed in more than one category, the most serious category is the one that is to be used. 28 C.F.R. §2.20, Notes to Adult Guidelines for Decision Making.

Billiteri's offense was conspiracy, 18 U.S.C. §371, but conspiracy is not listed among the Board's guidelines. According to the affidavit submitted by the Board prior to the decision in Billiteri II, the determination was made from reviewing the presentence report that Billiteri's offense most closely resembled extortion, and was appropriately assigned to the very high category. The Board failed to set forth any precise factual basis for reaching this particular determination. The result, however, is to place an offense carrying a maximum sentence of five years in a category with an offense carrying a maximum sentence of twenty years.

Billiteri possessed a salient factor score of 3, which qualified him for release in a range of 36 to 45 months. An inmate with a poor salient factor score

would be required to serve a range of 55 to 65 months under a similar offense severity finding. For that inmate, the range would extend beyond the statutory maximum which Congress has set for the actual offense committed. Certainly a sentencing court could not consider a punishment outside the statutory maximum. United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965); United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974). Yet, in the Board's view, it is within its discretion to virtually do so.

A further, and more important, consideration is the government's negotiation for and acceptance of a plea to conspiracy. That agreement binds the government.

Santobello v. New York, 404 U.S. 257, 262-63 (1971); S & E Contractors, Inc. v. United States, 405 U.S. 1, 10 (1972). Now the government, having successfully bargained away the obligation to prove extortion against Billiteri, seeks to establish Billiteri's guilt of the underlying substantive offense by the bald assertion that conspiracy cannot occur in a void. Examination of the plea, set forth above, however evidences Billiteri's minimum involvement. If there was to be any discussion of Billiteri's commission of the

substantive offense, that was the time.

An additional consideration is the effect of the use of the substantive offense in determining parole eligibility upon a defendant's knowing waiver of rights at the time of plea. Eve v. United States, 435 F.2d 177 (2d Cir. 1970); Michel v. United States, 507 F.2d 461 (2d Cir. 1974). See also YALE L.J., supra at 880-82.

Unfortunately, the Board did not set forth where, if anywhere, in the guidelines Billiteri's offense behavior was determined not to lie. For instance, under the moderate category, the offense of mailing threatening communications is found (18 U.S.C. §375). Examination of the minutes of the guilty plea proceeding indicates an offense behavior more closely approximating the sending of threatening communications than behavior approximating extortion. In fact, the sending of extortionate threats by mail appears to lie in the moderate category while a similar communication Billiteri transmitted by telephone would, in the Board's view, lie in the very high severity category.

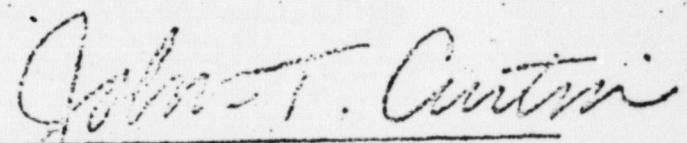
In the final analysis, this court is in a somewhat incongruous position. There is ample support for the proposition that Billiteri was an organized crime figure. The Board, however, did not rely on this fact in reaching its ultimate determination because there was allegedly a sufficient underlying basis for denying parole, to wit, the offense severity. This court finds, however, that the submitted underlying basis is without rational foundation and cannot support the determination made. Furthermore, another demand to the Board, in light of its past performance, is undeserved, as well as unfair to the plaintiff. Therefore, this court must fashion an appropriate remedy now.

Plaintiff Billiteri's history of organized crime ties indicates that his parole prognosis is at best uncertain. Under the circumstances, I find that his salient factor score of "8" does not accurately reflect his criminal tendencies as demonstrated by the testimony in this court. Therefore, I assign him a salient factor score of "0", the lowest possible.

In regard to his offense behavior, this court has twice rejected the Board's determination that the offense be placed in the "high severity" category. Assignment to any specific category below that of "high severity," however, reveals that Billiteri, even with a salient factor score of "0", has served the maximum period of incarceration applicable under the guidelines.

Therefore, the defendant, United States Board of Parole, is hereby directed to forthwith release the plaintiff, Albert M. Billiteri, on parole, attended by such conditions and privileges deemed appropriate by the Board in its discretion.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: September 17, 1975

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FOOTNOTES

1 Allegations regarding the denial of parole on the basis of Billiteri's organized crime ties were specifically denied by the government in Billiteri I.

2 In a letter dated March 15, 1974 Henry S. Peterson, Assistant Attorney General for the Criminal Division, addressed a memorandum to the Chairman of the Board of Parole in response to a specific request dated March 8, 1974 for information pertaining to the organized crime connections of Albert M. Billiteri. Significantly, the request from the Board predates by three days the initial determination denying Billiteri parole. In the letter, Mr. Peterson cites links between Billiteri and other reputed organized crime figures in the Western New York area. Mr. Peterson closes his letter with a recommendation that Billiteri not be paroled.

From the record submitted by the Board of Parole, it is clear that the procedures followed in Mr. Billiteri's initial determination by the Board were affected by the organized crime designation. In fact, the reason for referring Billiteri's case upon reconsideration to the Regional Board of Directors was that the case had initially been designated one of "original jurisdiction" because of the organized crime label placed upon him. 28 C.F.R. §2.17. From other documents submitted by the Board, it was determined in Billiteri II that the basis for referring Billiteri for original jurisdiction proceedings was the "mere allegation" of his ties to organized crime. This finding influenced significantly the court's decision to conduct a hearing on the propriety of the organized crime designation which Billiteri bore.

3 The government has voluntarily withdrawn the wiretap transcripts and they have not been considered by the court.

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Plea proceedings:

THE COURT: Now, both of you lawyers are aware of my purpose here. I want to take a plea under Criminal Rule 11 of the Rules of Criminal Procedure which will be a solid plea in the judgment of this Court and the lawyers, both for the Government and the defendants, which cannot be disturbed by subsequent application to this Court or another court for lack of compliance with Rule 11. You understand that, each of you?

MR. BOREANAZ: Yes, your Honor.

MR. RODENBERG: Yes, your Honor.

THE COURT: What is your client willing to admit, by way of overt acts and the criminal conspiracy, wherein I would find support to accept a plea to Count I?

MR. BOREANAZ: Your Honor, for the sole purpose of complying with Rule 11, my client is prepared to admit --

THE COURT: Excuse me. I want you to listen carefully. I am going to ask you whether you listened carefully and whether you do admit these facts.

MR. BILLITERI: Yes.

MR. BOREANAZ: For the sole purpose of complying with Rule 11, my client is prepared to admit that within the time period set forth in the first count of the

indictment that he and the co-defendant, here now before your Honor, conspired and agreed to violate the substantive section set forth within that count, and that an overt act in furtherance of that criminal conspiracy was performed, to wit, Overt Act 3 of the indictment, that on or about June 23, 1969, my client made a phone call to Joseph LaPorta.

THE COURT:

Now, I think I am going to have to have some further admission as to the nature and import of that call.

MR. BOREANAZ:

That call was in furtherance of the criminal conspiracy, your Honor, he would admit.

THE COURT:

In other words, in furtherance of the conspiracy to make these loans to one or more persons at exorbitant rates of interest, is that correct?

MR. BOREANAZ:

That is correct, your Honor.

THE COURT:

Mr. Billiteri, you have heard what your lawyer said. Did you make that call?

MR. BILLITERI: Yes, your Honor.

THE COURT:

Was it for the purpose that Mr. Boreanaz just outlined?

MR. BILLITERI: Yes, your Honor.